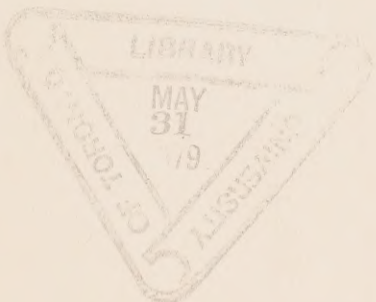
HIGHWAYS IN ONTARIO

A COMPILATION OF STATUTE AND CASE LAW



Ontario

Ministry of
Consumer and
Commercial Relations

HIGHWAYS IN ONTARIO

A COMPILATION OF
STATUTE AND CASE LAW

by
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TORONTO

THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

ISBN 0-7743-3688-9

FOREWORD

For many years, those of us concerned about the legal status of roads in Ontario have recognized the need for a comprehensive compilation of the relevant law. I had hoped that, with his extensive knowledge of the subject, such a project might have been undertaken by the late Thomas W. Styles, an employee of the former Department of Highways. The work which resulted in the text that follows was undertaken, at my request, by John T. Dowdell, Property Research Officer with the Legal and Survey Standards Branch of the Property Rights Division of the Ministry of Consumer and Commercial Relations.

John T. Dowdell, although not a lawyer, had formal legal training, and his work over the past several years has been directly related to the ownership of land. This is not John's first work to be published - he prepared "The Ontario Conveyancer's Directory" - nor do I expect it to be his last: he is already well into such subjects as subdivision control, riparian rights and accretion.

The basic arrangement of the text is John's, with only a modest input on my part. When the first draft was completed, I requested Prof. Dennis C. Hefferon of the Osgoode Hall Law School, York University, to review and comment on it. His comments resulted in some revisions. John and I then settled on a fairly detailed list of contents, following the format of some of the encyclopaedia-style legal text books, instead of a much more elaborate index.

This text should be of much assistance to lawyers, surveyors and employees of various levels of government who are directly concerned about the legal status of roads and other access routes. As with all compilations of authorities for legal propositions, the compiler attempts to cite, for each, all relevant statutory provisions and judicial decisions, but his selection may reflect either a conscious or subconscious decision he has made. The reader is, therefore, cautioned that the conclusions of the author of this text may not be shared by the judiciary.

The first published copies of this book will be duplicated by offset printing by the Ministry of Transportation and Communications from the original copy typed by the author. Only relatively few copies are to be printed initially, for distribution within that Ministry, as well as to the Land Registrars and other senior staff of the Property Rights Division.

Finally, on behalf of all future readers, I compliment John Dowdell for a job well done, and sincerely thank Dennis Hefferon for his contribution.

Richard E. Priddle
Director
Legal and Survey Standards Branch

Toronto
December, 1978

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HIGHWAYS IN ONTARIO

PART 1 - EARLY LEGISLATION

The purpose of this part is to acquaint the reader with some important aspects of early legislation relative to public highways enacted before 1850.

THE JURISDICTION OF THE MAGISTRATES IN QUARTER SESSIONS

1793 - 1810. In 1793, the Legislative Council and Assembly of the Province of Upper Canada enacted the statute 33 Geo. III. ch. 4, being AN ACT TO REGULATE THE LAYING OUT, AMENDING AND KEEPING IN REPAIR, THE PUBLIC HIGHWAYS WITHIN THIS PROVINCE. By that Act, a certain Ordinance, passed in the seventeenth year of the reign of His Majesty King George the Third, entitled AN ORDINANCE FOR REPAIRING AND AMENDING THE PUBLIC HIGHWAYS AND BRIDGES, IN THE PROVINCE OF QUEBEC, was repealed, and it was thereby enacted,

> That each and every justice of the peace, acting under and by virtue of his Majesty's commission, shall be and they are hereby declared to be commissioners to lay out and regulate the highways and roads, within the respective counties, divisions or limits, in which they shall act, of the several districts within this Province.

The Act also provided for the appointment of persons to be employed as overseers of the highways and roads to be nominated and appointed according to the provisions of 33 Geo. III. ch. 2, being AN ACT TO PROVIDE FOR THE NOMINATION AND APPOINTMENT OF PARISH AND TOWN OFFICERS WITHIN THIS PROVINCE.

The commissioners were empowered and authorized by the Act of 1793, 33 Geo. III. ch. 4, to regulate the roads already laid out, and the Act provided that,

> if any of them (roads already laid out) shall appear to be inconvenient and that an alteration be necessary, and the same be certified on oath, by twelve principal freeholders of the district, to be summoned by the high sheriff, his deputy, or any constable of the division, by virtue of a warrant to be issued by two justices of the peace for that purpose, the commissioners may alter the same, and also lay out such other public highways and roads, as they or the major part of them, shall think most convenient, as well for travelers, as for the inhabitants of each neighbouring parish, township or place, which highways and roads, so laid out, shall be common public highways.

The width of the roads to be laid out was left to the discretion of the commissioners for the time being, of the parish, township, or place through which such roads might pass, so that the same

> be not less than thirty feet, and do not exceed sixty feet: Provided always, that the front roads on the water, and between every concession, shall in no case be less than sixty feet.

1810 - 1850. The Act of 1793, 33 Geo. III. ch. 4, was repealed by the Highways Act, 50 Geo. III. ch. 1, entitled AN

ACT TO REGULATE THE LAYING OUT, AMENDING AND KEEPING IN REPAIR THE PUBLIC HIGHWAYS AND ROADS IN THIS PROVINCE, AND TO REPEAL THE LAWS NOW IN FORCE FOR THAT PURPOSE, passed 12th March, 1810. Section 2 of the new Act provided,

> And ... it shall and may be lawful for his Majesty's justices of the peace, in quarter sessions assembled in the month of April in each and every year in the several districts of this province, except in the districts of London and Johnstown - and in the district of London, for his Majesty's justices of the peace so assembled, in the month of June, and in the district of Johnstown, for his Majesty's justices of the peace so assembled, in the month of May, in each and every year - or the majority of them, to appoint, as occasion may require, one or more surveyor or surveyors of highways, in each and every county and riding, throughout this province, within their respective districts, to lay out and regulate the highways and roads within such county or riding, in manner hereinafter mentioned; ...

When the Highways Act, 50 Geo. III. ch. 1, was enacted in 1810,

> The two classes of highways then in the contemplation of the Legislature were the original allowances for roads made by the King's surveyors, - the fee of which undoubtedly remained in the Crown subject to the public easement - and the Quarter Sessions highways then already laid out under 33 Geo. III. ch. 10 or to be laid out and established under the authority of the new Act.: THE MUNICIPAL MANUAL. BIGGAR, 11th ed. pp. 817 and 818. [Note: The reference to 33 Geo. III. ch. 10 appears to be an error. Presumably, 33 Geo. III. ch. 4 was intended.]

In *Palmatier v. McKibbon (1894), 21 A.R. 441,* the plaintiff brought an action to restrain the defendant from trespassing upon his lands. A road ran across the lands in question and the defendant contended that the road was a public road which he had the right to use, and this was the question in issue in the action.

The records of the Court of Quarter Sessions show that a report was made in 1834 by the surveyor of highways for the township of Maryborough respecting the laying out by him of a road following the shore of Point Traverse. The report was minuted with a note that it was confirmed by the Court. The papers relating to the matter could not be found, most of the records of the township having been destroyed by fire, these probably among them. The road was afterwards, with the consent of all parties interested, abandoned, and the road in question at the trial was adopted instead, and it was used until the year 1860, statute labour being done upon it. In that year the plaintiff's immediate predecessor in title petitioned the township council for leave to close the road by erecting a gate at the line dividing the land owned by him from that owned by his neighbour to the west.

The council accepted a bond from the plaintiff's immediate predecessor in title in which he agreed that, upon application, he would cause the road to be opened to the public without charge. The council then passed a by-law closing the road, the erection of the gate being the only act done to accomplish that purpose. There was no idea of permanently closing the road. Statute labour was performed after the gate was erected on the east and west sides of the gate by the same gang of men under the same foreman or pathmaster, and without regard to any differences in title or ownership, or right of user of the road as thus divided by the gate.

Hagarty, C.J.O., said, at p. 447,-

It was urged that the road in some places varied some rods from (the surveyor's) original line, but we may accept the learned (trial) judge's finding that "the highway now in dispute substantially agrees with the original road."

The judgment below treats the defendant as a trespasser. It is a singular result as to a road opened nearly sixty years ago, and as far as we can judge, professing to be opened under the authority of the Quarter Sessions, by the regular surveyor of highways, whose report to the Sessions was clearly confirmed and approved by the Court. So opened with the apparent knowledge and assent of the then owners; used as a road for some twenty-six years down to 1860; then described and treated as an existing road by the council and ... the plaintiff's predecessor in title, and the public right thereto admitted in his bond; the expenditure of township money on many occasions; a continued user, and finally the present plaintiff in a grant of land at the Point, affects to grant a right of way there; up to what he calls and admits to be a public road where he had erected his gate.

I think we must allow the appeal.

Maclennan, J.A., having come to the same conclusion as the Chief Justice, on what he thought to be the proper construction of the statute 50 Geo. III. ch. 1, expressed his opinion on that point at pp. 449 - 453 as follows,

The records of the Quarter Sessions which escaped destruction by fire shew the appointment of a surveyor, Mr. Rose, as authorized by the statute; and also shew that a report was made by him and considered and confirmed by the justices at the proper Court in that behalf in July, 1834. The records shew the bearings and limits of a road substantially identical with the road in question. Now this judicial act is just such an act as is authorized by the statute, if we suppose that Rose was put in motion by a petition from twelve freeholders. If there was no petition, then the act was wholly unauthorized and void, and the case is, therefore, within the maxim, *"Omnia praesumuntur rite esse acta"* [All things are assumed to have been done rightly], and we must presume that not only the Court of Quarter Sessions, but the surveyor Rose, did what they did, not out of mere caprice and without legal warrant, but in the manner prescribed and by the authority conferred by law. A stronger case for the application of the maxim can hardly be imagined, more especially when it is proved, apart from the records, that the road was laid out at that time and was used as such by the public from that time until the year 1860; and when it is also considered that otherwise the surveyor and those who assisted him, as well as those who used the road afterwards were all trespassers ...

If then we assume that everything was regularly done down to and inclusive of the confirmation of the report by the Quarter Sessions, the question arises whether anything further was required to constitute the road a public highway. It was contended by the respondent that the statute required the Court, not merely to confirm the report, but to direct the road to be opened; and that no such direction having been made or given, it never became in law a public highway. For this proposition, *Re Lawrence and Thurlow, 33 U.C.R. 223,* was cited, and in a dictum in the judgment of Morrison, J., ... it is suggested, but without reasons, that a minute merely allowing the report without directing or ordering that the road should be opened would not be sufficient to establish it as a highway. ... as a dictum, I think, with great respect, it cannot be maintained. I think that it is very plain when the

several sections of the Act and the language employed by the Legislature are considered. Section 12 declares that "all roads laid out by virtue of any Act of the Parliament of this Province, * * shall be deemed common and public highways." The title of the Act is "An Act to provide for the laying out, amending and keeping in repair the Public Highways," etc. By section 2, the justices in Quarter Sessions are authorized to appoint a surveyor or surveyors of highways "to lay out and regulate the highways and roads." By section 3, the application of the freeholders is to state in one of its alternatives, that "it is necessary to open a new highway or road," and the surveyor is required to examine the same and report thereon in writing, describing particularly "the new highway or road to be opened," giving notice in writing by affixing a copy in two public places near where the new highway or road is intended "to be opened." The section then goes on to say that if no opposition shall be made to such report, "it shall and may be lawful for the said justices, * * and they are hereby required, to confirm the said report, and to direct such alteration to be made, or such new highway or road to be opened accordingly." The same section then goes on to provide for what shall be done in case of opposition to the report. In that case a jury is to be empanneled, who, after hearing evidence touching the intended new highway or road, "shall, upon their oath, either confirm or annul the said report, or alter or modify the same, * * and their verdict shall be final, and the said justices shall direct such highway or road to be altered or opened accordingly. And such highway or road so altered or opened, shall be and is hereby declared to be a common and public highway." It is then enacted that the report as confirmed or altered shall remain as a record and description of the highway or road in the office of the clerk of the peace; and a copy shall be entered in a book to be by him kept for the purpose. Now the question is, what is the meaning of "opening a road," as the phrase is used in the statute? Does it mean laying it out on the ground by survey in the usual manner, and declaring that as so laid out it is a public highway; or does it mean something more, namely, clearing the ground of the forest or other obstructions, so as to make it more or less fit for actual use? I think it is plain that it is used in the first of these senses only, and that "laying out" and "opening out," are used in an equivolent sense.

To understand what was meant, the condition of the Province in the year 1810, when the Act was passed, must be borne in mind. At that time the greatest part of it was covered by the original forest. The allowances for roads made by the Crown surveyors were declared to be highways, without any work being done upon them, and the only means for fitting them, or any other roads, for actual use, was by the statute labour of the inhabitants, and small annual grants made by the general government for that purpose. This very statute, by section 16, provides that the roads and highways in and through every township, etc., shall be cleared, repaired and maintained by the inhabitants; ... Therefore the new roads to be laid out under this Act, would, as a rule, be through the forest, and the only provision for opening them, in the sense of clearing, was by the statute labour of the inhabitants as provided by section 16 and subsequent sections under the direction of the overseers. We know that it was only by degrees that the roads were opened up; first a mere path, then a winter road; afterwards the trees cut down, the stumps remaining, and finally the stumps removed and the road graded; the whole proceeding taking a number of years. Now, when we look at the language of the Act, we find that in the title, in the preamble, and in all the sections but one, the phrase used for the legal establishment of a road as a highway, is "laying out." ... The exception is section 3, and in that section the phrase is "open" or "opened," and it is used many times, while the other phrase is not used at all. It is evident, however, that the same

thing is meant by both phrases, and the difference has probably arisen from section 3 having been penned by a different draughtsman. If we construe "opening" to mean something different from "laying out," that is, removing timber, etc., and making it fit for travel, a road would not become a legal highway until after the work was done, for the language of the Act is, "such highway or road so opened, shall be, and is hereby declared to be a common and public highway." Until it became a highway, however, there was no provision for doing any work upon it. Section 16 provides that the roads shall be cleared, repaired and maintained by the inhabitants under the direction of overseers by statute labour; and there is no power given to the Quarter Sessions either to provide labour or to expend money for opening a road. If it was intended that the justices should open the road in the second sense, some provision would have been made for doing the work and paying for it, which the Act does not do.

If then what the justices are ordered to do is merely to declare that the road laid out and reported by the surveyor is a highway, and in that sense is opened, that is in effect done when they confirm the report of the surveyor, or when it is confirmed by a jury summoned by them for the purpose. They have no further option in the matter; in the one case, "they are hereby required to confirm the said report, and to direct such new highway or road to be opened," and in the other, "they shall direct such highway or road to be opened accordingly."

I think it is very clear, looking at the whole Act, that it was the intention of the Legislature that, when the report of the surveyor was confirmed either by the justices themselves in the absence of opposition, ... or by the verdict of a jury in case of opposition, the road laid out by the surveyor and described in his report, should from that time be in law a public highway. This intention is not only expressed clearly and strongly in section 12, but also in section 35, which declares that when a road is *laid* out under the provisions of the Act, the soil and freehold thereof should be vested in His Majesty.

I am therefore, of opinion that the road here in dispute was and is a public highway, and that the appeal should be allowed and the action dismissed.

THE ESTABLISHMENT OF LOCAL AND MUNICIPAL AUTHORITIES

All the sections of the Highways Act, 50 Geo. III. ch. 1, were repealed, except the 12th section, by the statute 12 Vic. ch. 80, entitled AN ACT TO REPEAL THE ACTS IN FORCE IN UPPER-CANADA, RELATIVE TO THE ESTABLISHMENT OF LOCAL AND MUNICIPAL AUTHORITIES, AND OTHER MATTERS OF A LIKE NATURE, effective January 1, 1850, and by the statute 12 Vic. ch. 81, entitled AN ACT TO PROVIDE BY ONE GENERAL LAW, FOR THE ERECTION OF MUNICIPAL CORPORATIONS, AND THE ESTABLISHMENT OF REGULATIONS OF POLICE, IN AND FOR THE SEVERAL COUNTIES, CITIES, TOWNS, TOWNSHIPS AND VILLAGES IN UPPER-CANADA, the jurisdiction over roads formerly exercised by the Magistrates in Quarter Sessions was given to the municipalities, effective January 1, 1850. Section 190 of the statute 12 Vic. ch. 81, enacted as follows,

> ... all powers, duties or liabilities vested in or belonging to the Magistrates in Quarter Sessions, with respect to any particular Highway, Road or Bridge in Upper Canada at the time this Act shall come into force, shall from thenceforth become and be vested

> in and belong to the Municipal Corporation of the County in which such Highway, Road or Bridge shall lie, or in case of such Highway, Road or Bridge lying within two or more Counties, shall be vested in and belong to the Municipal Corporations of both such Counties, subject always to the provisions of this Act as to the mode and manner of exercising, performing and meeting such powers, duties and liabilities, and all rules and regulations made and directions given by such Municipal Corporation or Corporations in the premises shall have the like force and effect to all intents and purposes whatsoever as those which such Magistrates had previously the power of making or giving respecting the same, and neglect of or disobedience to any such rules, regulations or directions so to be made or given by such Municipal Corporation or Corporations, shall subject the defaulter or defaulters in the premises to the like penalties, forfeitures and other consequences both civil and criminal as such neglect of or disobedience to similar rules, regulations or directions of such Magistrates would have subjected them to, previous to this Act coming into force.

STATUTE LABOUR

Generally, statute labour performed on roads was required of all males of the age of twenty-one years and upwards. The statutes in that regard were amended from time to time so that certain classes of persons, e.g., firemen, were excused and commutation was allowed. Even commissioners were required to perform statute labour. See 3 Vic. ch. 10 and 55 Vic. ch. 48.

TOLL ROADS, BRIDGES, CANALS AND HARBOURS

Some of these were government sponsored but many were undertaken by private individuals and companies.

The statute 3 Wm. IV. ch. 38 (Passed 13th February, 1833.) authorized 10,000 pounds to be raised by loan on the credit of the tolls to be levied and collected on the three public high roads approaching the town of York commonly called Dundas street, Yonge street and Kingston Road which the statute authorized to be improved. Trustees were appointed and authorized to erect - on completion of the improvements - toll gates and houses. The trustees were to appoint keepers to attend the said gates and collect the tolls payable thereat.

By 10 Geo. IV. ch. 15 (Passed March 20, 1829.), The Dundas and Waterloo Turnpike Company was incorporated for

> the sole purpose of improving, opening, making and keeping in repair, a turnpike road from the extremity of the village of Dundas to the western extremity of Waterloo, following the present established and travelled road, through what is commonly called the Swamp Road.

The tolls collected were to be accounted for and there was a limitation on the profits to be derived from the turnpike. The statute provided,

> After completion, His Majesty, by any act of the legislature may assume the possession and property of the said road, bridges, toll houses, turnpikes and conveniences and dissolve the said corporation, upon paying to the corporation the full and entire value which the same may, at the time of such assumption, be worth and six *per cent.* over and above the valuation, and thereupon the tolls belong to his Majesty and the person administering the government shall account from time to time to the legislature of this province for all tolls and duties arising therefrom.

The Cataraqui Bridge Company was incorporated by 8 Geo. IV. ch. 12 (Passed February 17, 1827.). Section 3 of that Act said,

> the said company are hereby authorized and empowered, at their own cost and charge, to erect and build a good and substantial bridge over the great river Cataraqui, near the town of Kingston, in the Midland district of this province, from the present scow landing on the military reserve opposite to the northeast end of the continuation of Front street, in the said town, to the opposite shore on point Frederick, at the present scow landing on the military reserve, adjoining the western addition of the township of Pittsburgh in the said district, with convenient access thereto at both ends of the said bridge, to and from the adjacent highways at present in use; that the said bridge shall be at least twenty-five feet in width, and of sufficient strength for the passage of artillery carriages, and cattle of every description, having sufficient side rails for the security of passengers, and a convenient foot-way for passengers, separated from the carriage-way by secure railings; that the said company shall also be at liberty to erect and build toll houses and toll bars and to construct turnpikes and other necessary dependencies on or near the bridge, and also from time to time to alter, repair, amend, widen or enlarge the same; and that for the purpose of erecting, building and keeping in repair the said bridge, the said company shall have full power and authority to take from time to time and use such land on either side of the said river, at the places aforesaid belonging to his Majesty, as may be necessary, and there to lay timbers, boards, lumber, stone, gravel, sand and all other materials, which may be requisite for building, maintaining, or repairing the said bridge, and there to make, work up, and finish the same, doing no unnecessary damage, and also to construct, make, perform, and do all other matters and things which they shall think necessary and convenient for the making, preserving, improving, completing and using the said bridge, in pursuance of and within the true meaning of this Act: Provided always that the said company shall make, or cause and procure to be made, in some part of the bridge, a draw bridge, or moveable part, not less than eighteen feet in length, for the passage of all vessels, boats, and craft, of every description, and shall cause the same to be opened for the passage at all hours during the season of navigation, without exacting any toll or reward; and that if from any improvement which shall hereafter be made, it shall become desirable to have a passage for vessels or boats of larger dimensions, through or under the said bridge, it shall be incumbent upon the said company, so soon as practicable, to increase the dimensions of their draw bridge, so that navigation shall not be obstructed by the said bridge.

It was provided by section 4 of the said Act

> That the said bridge, toll houses, turnpikes, and all other dependencies at or near thereto, and also the approaches to the said bridge, and all materials which shall be from time to time gotten or provided for erecting, building, making, maintaining, or repairing the same, shall be and the same, shall be and the same are hereby vested in the said company and their successors forever; and so soon as the said bridge shall be erected and built, and the same, as well as the access thereto, shall be made fit and proper for the passage of travellers, carriages, and cattle, of every description, and that the same shall be certified by the

clerk of the peace, by order of a majority of the justices of the peace, present at any general quarter sessions of the peace, or at any adjourned general quarter sessions, and notice of such certificate shall be published twice in each of the public newspapers in the town of Kingston, it shall and may be lawful for the said company, and their successors from time to time, and at all times, to ask, demand, receive, recover, and take, as toll, to and for their own proper use, benefit, and behoof, for pontage, as in the name of a toll or duty, before any passage over the said bridge shall be permitted, the several sums following, that is to say:

For every waggon or carriage of any description on four wheels, (laden or unladen,) drawn by two horses, oxen or other beasts of draught, seven pence halfpenny, provincial currency.

For every carriage with four wheels, drawn by one horse, six pence.

For every additional horse, ox or other beast of draught, two pence halfpenny.

For every chaise, cart, or other vehicle, on two wheels, (laden or unladen,) drawn by one horse, ox, or other beast of draught, six pence.

For every additional horse, ox, or other beast of draught, one penny halfpenny.

For every carriole, sleigh, or other vehicle, without wheels, drawn by one horse, or other beast of draught, six pence.

For every additional horse, or other beast of draught, two pence halfpenny.

For every horse and his rider, five pence.

For every horse, mule, ass, ox, bull or cow, two pence halfpenny.

For every hog, pig, goat, calf, sheep or lamb, one penny.

For every person who shall pass the said bridge, except children under two years of age, and except the driver of any chaise, carriage, cart, waggon, train carriole, sleigh, or other vehicle, two pence.

Provided also, that the said company and their successors, shall affix, or cause to be affixed, and kept affixed, at or near the toll house or gate, a table of the rates of toll payable for passing over the said bridge, painted or written in plain and conspicuous characters.

The tolls were vested in the company and their successors and there was a proviso for carrying into effect any agreement that might be made by the company with his Majesty's government for the passage of soldiers, ... free of toll.

The company was required to complete the bridge in three years otherwise the tolls were to belong to his Majesty and the company was to provide ferry boats while the bridge was being rebuilt or repaired.

Section 27 of the said Act said,

That after the expiration of fifty years, to be accounted from the passing of this act, it shall and may be lawful for his Majesty, his heirs and successors, under the authority and upon the condi-

> tions, and subject to the provisions, of any act of the legislature of this province to assume the possession and property of the said bridge, toll houses, turnpikes, and dependencies, and the approaches thereto, upon paying to the said company the full and entire value thereof at the time of such assumption, which value shall be ascertained by three arbitrators, one of whom shall be appointed by the governor, lieutenant governor, or person administering the government of this province, another by the said company, and a third shall be chosen by such two arbitrators; and his Majesty shall, in the manner hereinbefore mentioned, assume the possession and property of the said bridge, toll houses, turnpikes, and dependencies, and the approaches thereto, then the said tolls shall, from the time of such assumption, appertain and belong to his Majesty, his heirs and successor, to and for the uses to be declared in any such act, who shall from thenceforth be substituted in the place and stead of the said company for all and every the purposes of this act.

By the statute 8 Geo. IV. ch. 16 (Passed February 17, 1827.), Chauncey Beadle, his executors, administrators or assigns, was given an exclusive privilege of running a public stage from Ancaster to Sandwich for twenty-one years, upon certain conditions.

Ironically, the Rideau Canal, which attracts many Americans to Ontario every year, was built by the Imperial Government as part of its system of defence to keep the Americans out. The object in building the canal, really a system of canals, was to provide a water route from Montreal to Kingston on Lake Ontario via the Ottawa River, safe from the fire of American guns on the south shore of the St. Lawrence River. The idea was conceived during the War of 1812 and construction of the canal was begun in 1826 under the direction of Colonel By of the Royal Engineers.

The Desjardins' Canal Company was incorporated by 7 Geo. IV. ch. 18 (Passed 30th January, 1826.) to form a water communication or canal, sufficient for the passage of sloops and other vessels of burden, from Burlington Bay to the Village of Cootes Paradise on Lake Ontario, through the intervening marsh and other lands. This Act was to continue in force, from the time of passing thereof, for fifty years, at which time the estate, rights, titles, tolls and rates, of the said canal, with the waters and navigation thereof, were to vest in His Majesty, His Heirs and Successors, to and for the use of this Province, unless otherwise provided for by some future Act of the Legislature.

The statute 8 Geo. IV. ch. 18 (Passed February 17, 1827.) provided for 3,000 pounds to be raised by debentures and applied to constructing a harbour at the mouth of Kettle creek, in the district of London. The tolls were to be paid to the Receiver General.

By the statute 9 Geo. IV. ch. 19 (Passed March 25, 1828.), William Chisholm, his heirs, executors and assigns, the owner of the lands on both sides of the Sixteen-Mile creek, near the mouth, was within five years from the passing of the Act, to construct a harbour at the entrance of the Sixteen-Mile creek into lake Ontario, in the township of Trafalgar, in the district of Gore, which was to be accessible to, and fit, safe and convenient, for the reception of such description and burthen of vessels as commonly navigate the said lake. The Act made it lawful for the said William Chisholm, his heirs, executors, and assigns, to erect and build all such needful moles, piers, wharves, erections, buildings and edifices, as should be useful and proper for the protection of the said harbour, and for the accommodation of vessels entering or lying

within the same. The tolls were to be paid to William Chisholm, his heirs, executors, and assigns, and, after fifty years, the harbour and all right to tolls, etc., were to vest in his Majesty.

By the statute 10 Geo. IV. ch. 11 (Passed March 20, 1829.) the petitioners therein named (together with all such other persons as should become stockholders) were ordained, constituted, and declared to be a body corporate and politic, capable of contracting and being contracted with, of suing and being sued, pleading and being impleaded, and were authorized and empowered, at their own cost and charge, to construct a harbour at Cobourg. The harbour, moles, piers, wharves, buildings, erections and all materials which should be from time to time got or provided for constructing, building, maintaining, or repairing the same, and the said tolls on goods, wares, or merchandize, were vested by the Act in the said company and their successors forever, However, section 17 of the Act provided for the possession of the harbour, etc., being assumed by his Majesty at any time after fifty years from and after the making and completing of the said harbour upon paying to the company the full amount of their respective shares.

The Cobourg Harbour was vested in the Municipality of the Town of Cobourg by 13 & 14 Vic. ch. 83 (Passed 10th August, 1850.).

A general Act, 12 Vic. ch. 84 (Passed 30th May, 1849.), entitled AN ACT TO AUTHORIZE THE FORMATION OF JOINT STOCK COMPANIES FOR THE CONSTRUCTION OF ROADS, AND OTHER WORKS IN UPPER CANADA, recited as follows,

> Whereas it is expedient to encourage the construction of sawed, hewed or split Plank, Macadamized or Gravelled Roads, and also Bridges, Piers, Wharves, Slides and Dams connected therewith, in Upper Canada, by companies who may be disposed to subscribe the necessary capital for the completion thereof; and whereas the delay and expense incident to obtaining a special Act of Incorporation from the legislature for each separate Company, operates as a great discouragement to persons desirous of embarking capital for the formation of such Companies: Be it therefore enacted ... That any number of persons not less than five, respectively, may in Upper Canada, in their discretion, form themselves into a Company or Companies, under the provisions of this Act, for the purpose of constructing in and along any Public Road or Highway, allowance for Road or otherwise, any Road or Roads of the kind mentioned in the Preamble to this Act, not less than two miles in length, and also any Bridge or Bridges, Pier or Piers, Wharf or Wharves, Slide or Slides, and any Dam or Dams connected therewith in Upper Canada: ...

The general Act provided that,

> every such road or other such work ..., and all materials which shall from time to time, be got or provided for constructing buildings, maintaining or repairing the same, and all toll-houses, gates and other buildings constructed or acquired by and at the expense of any such Company, (under the provisions of the general Act) and used for their benefit and convenience, are vested in the Company and their successors.

In section 28 of the general Act it was said

> That after twenty-one years from the time of completing any such road or other work as aforesaid, it shall and may be lawful for

> any Municipal authority representing the interests of the locality through or along the boundary of which any such road shall pass, or in which the work shall be situate, to purchase the stock of such Company at the current value thereof at the time of purchase, (to be ascertained by Arbitrators to be appointed and to act in the manner hereinbefore provided in other cases, if the Company and the Municipality cannot agree upon such value,) and to hold the same for the use and benefit of the said locality, and such Municipal authority shall thenceforth stand in the place and stead of the said Company, and shall possess all such powers and authority as the said Company shall have theretofore possessed and exercised.

If a road, bridge or work was allowed by a company incorporated under the general Act to fall into decay and get out of repair, the company might be indicted at any Court of General Sessions of the Peace or other Court of Superior Jurisdiction within or along the boundary of any district where such road, bridge or work was out of repair; upon conviction the Court was to direct the company to make the necessary repairs within a reasonable time, and in default thereof the company was to be declared dissolved and such road, bridge or work was to vest in Her Majesty, Her Heirs and Successors, to and for the use of the public, in like manner as any public and common highway or public work, and was thenceforth to be subject to all the laws affecting public highways and public works, and the powers of such corporation were thenceforth to vest in the municipality having jurisdiction as aforesaid, which was thereupon to take on itself the order and management of the said road as the said company had theretofore done.

Provision was made by THE TOLL ROADS EXPROPRIATION ACT, 1901, 1 Edw. VII. ch. 33, for the expropriation of toll roads by municipalities. The Act provided for the appointment of arbitrators to determine the price to be paid for any toll road, either by agreement with the owners or, if necessary, by arbitrators. The municipalities were empowered to borrow money for the purchase of roads in accordance with the award of the arbitrators. But a municipality was not entitled to take possession of a road until the amount agreed upon or awarded to the company or owner was paid.

AN ACT FOR THE IMPROVEMENT OF PUBLIC HIGHWAYS, 1901, 1 Edw. VII. ch. 32, set apart the sum of $1,000,000. to be paid out of the Consolidated Revenue Fund of the Province to aid in the improvement of public highways, and municipalities were authorized to apply the whole or part of the moneys to which they were entitled under the Act towards paying any expense incurred for the purchase of any toll roads within such municipalities, or for freeing the same from tolls.

THE TOLL ROADS ACT, 2 Geo. V. ch. 50, R.S.O. 1914, ch. 210, was repealed by THE STATUTE REVISION AMENDMENT ACT, 1927, 17 Geo. V. ch. 28, sec. 22.

PART 2 - ORIGINAL ROAD ALLOWANCES

Section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads, in part, as follows,

> 399. Except in so far as they have been stopped up according to law, all allowances for roads made by the Crown surveyors ... and all alterations and deviations of and all bridges over any such allowances for road, ... are common and public highways.

POSSESSION OF AN UNOPENED ROAD ALLOWANCE

Section 445 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, is as follows,

> 445.-(1) A person in possession of and having enclosed with a lawful fence that part of an original allowance for road upon which his land abuts that has not been opened for public use by reason of another road being used in lieu of it or of another road parallel or near to it having been established by law in lieu of it shall, as against every person except the corporation the council of which has jurisdiction over the allowance for road, be deemed to be legally possessed of such part until a by-law has been passed by such council for opening it.
>
> (2) No such by-law shall be passed until notice in writing of the intention to pass it has been given to the person in possession, at least eight days before the meeting of the council at which the by-law is to be taken into consideration.

The following excerpts are from the judgment of Proudfoot, V.C., in *Nash v. Glover (1876), 24 Gr. 219,* in which he considered the effect that ought to be given to the possession by the plaintiff in that case of an original road allowance, for a long term of years - forty or upwards.

> The original road allowance I found to be established as contended for by the defendant, and it has been in possession of the plaintiff or those he represents for the term mentioned above, [forty years or upwards] but, within the last few years, the municipality of Saltfleet has passed a by-law for opening it.
>
> The survey of Saltfleet was made in 1788. In 1810 the Act relating to public highways, 50 Geo. III. ch. 1, was passed, by the 12th section of which it was enacted, that all allowances for roads made by the King's surveyors in any township, shall be deemed common and public highways, unless such roads have been already altered according to law, or until such roads shall be altered according to the provisions of that Act. By the 12 Vic. ch. 80, all the sections of that Act were repealed, as many of them had been before, except the 12th section.
>
> The Consol. Stat. U.C. ch. 54, sec. 313, in effect re-enacted the 50 Geo. III. ch. 1, sec. 12; and section 333 provided that in case a person be in possession of any part of a Government allowance for road laid out adjoining his lot and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, &c., such person shall be deemed legally possessed thereof as against any private person, until a by-law has been passed for opening such allowance for road, by the council having jurisdiction over the same. A similar enactment is to be found in the Municipal Act of 1866, sec. 355. [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 445, *supra*.]

I apprehend that under these Acts there is no power in the executive to extinguish an original road allowance; that the only mode in which that can be accomplished is, the manner pointed out by the Act. The road allowances are perpetual, until altered or extinguished by the proper legal authority. The Acts recognize the power of the municipality to open road allowances, notwithstanding possession has been had.

In *Re McMichael and The Corporation of the Township of Townsend, 33 U.C.R. 158,* was an application to quash a by-law to open a road allowance. A travelled road had been opened adjoining the original road allowance, and used since 1824, and the road allowance had been enclosed since 1858, a period of fourteen years. The Court refused to quash the by-law.

The possession there, indeed was only for fourteen years, but the language of the statute and the principle of the decision would apply to any length of possession.

In *Dawes v. Hawkins, 8 C.B.N.S. 848, 7 Jur. N.S. 262,* a highway had been abandoned and enclosed in part for fourty-four years, and entirely for twenty-five years, and another travelled by the side of the original road. Erle, C.J., says "The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land, by reason of a willful obstruction, is no more the user of a highway as of right than the user of a deviation over the adjoining land by reason of the highway being founderous." And Byles, J., says, "It is also an established maxim, 'once a highway, always a highway.' For the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum,* or by proceedings before magistrates under the statute."

These observations are peculiarly applicable to the present case. The travelled road was supposed to be the original allowance, and the parties using it deviated without knowing it, and such user it seems would not give them the right to continue to use the deviating line, it not being a user as of right, nor would it amount to an abandonment of the original road allowance, although that would be inoperative, as the only means of extinguishing a highway is by the modes pointed out under our statutes.

The case of *Rex v. Allan, 2 O.S. 90,* was referred to as a clear authority that the Crown can change existing road allowances. In that case part of what was laid out as Lot street, in what is now the City of Toronto, was, on account of a large ravine and creek with some wet spots, ordered by the Governor in Council to be sold, and it was sold to the adjoining owner in 1798, who enclosed it. At that time the only statute on the subject was the 33 Geo. III. ch. 4, (1793) which applied to the laying out, mending and keeping in repair the public highways and roads within the Province: and it was held by the Court not to apply to the street in question, as it was not a highway when the Act was passed, and was not laid out by Commissioners under that Act. The statute of 1810 had not yet been passed, so that there was nothing to prevent the Crown granting the road allowance if so minded, and the Act of 1810 was not retrospective: *Field v. Kemp, 3 O.S. 374,* is to the same effect.

This whole subject was investigated in *Regina v. Hunt, 16*

U.C.C.P. 145, and it was held that after a road has once acquired the legal title of a highway, it is not in the power of the Crown, by grant of the soil and freehold thereof to a private person, to deprive the public of their right to use the road.

And in *Mountjoy v. The Queen, 1 E. & A. 294*, it was decided that a patent granted of land, part of which included a street laid out two days before the patent issued, did not affect the survey which had been made of the road; and as the road had been established under the Act of 1810 and had not been altered according to that Act, that the patent did not and could not make a grant of it; and that the party who had taken possession of it was guilty of a nuisance for the obstruction of the highway.

There are other cases to the same effect, and they establish that an original road allowance cannot be extinguished except by proceedings under the Acts referred to; that a grant even by the Crown cannot extinguish it; that the right of the public remains *in perpetuum*, though it may lie dormant, it may be revived until steps under the Acts have killed it.

UNLAWFUL OBSTRUCTION OF UNOPENED ROAD ALLOWANCES

In *Membery v. Smith, [1918] O.W.N. 119*, an unopened allowance for road crossed the lands of the plaintiff and defendant. The defendant, in order to keep his cattle from straying into the village of Adolphustown, had placed fences across the whole peninsula at the extremity of which the plaintiff's lands were situated. The lands of the defendant intervened between the lands of the plaintiff and the pricipal portions of the village. The plaintiff's access by land to his lots was thus obstructed; but at First street the defendant had arranged an entrance through his fence by means of bars. The defendant did not assume to prevent the plaintiff from travelling along First street to his lots, but declined to remove the fences or bars where they were on the unopened highway.

The question was, whether the plaintiff had sustained such substantial injury beyond that suffered by the rest of the public as enabled him to maintain the action. Masten, J., said,

Notwithstanding that the plaintiff's lands were of small extent, producing only wild and marsh grass and fit only for a little pasturing, and were of trifling value, and notwithstanding that the lands had never been used by the plaintiff and that he had not shewn actual pecuniary loss, yet, having regard to the facts that he owned the lands in fee simple and access to them by land was interfered with, he came within the decided cases, and must succeed. See *O'Neil v. Harper (1913), 28 O.L.R. 635*.

The defendant asserted a right to put a fence and bars across the road allowance, and refused to remove them. The plaintiff was entitled to free and uninterrupted passage over this highway which had never been closed. That it had never been opened up, cleared, and improved by the municipality did not make it any less a legal highway: see the Surveys Act, R.S.O. 1914 ch. 166, sec. 19.

There should be judgment for the plaintiff ordering the defendant to remove all obstructions placed by him or his predecessors in title on the highway or road allowance; enjoining him from hereafter placing any obstruction thereon; and directing the defendant to pay the plaintiff his costs, ...

In *Gordon v. Hall and Hall (1958), 16 D.L.R. (2d) 379,* one of the questions before the Court was what right the plaintiff, who was the owner of all the lands bounding the waters of a small non-navigable lake, crossed by an unopened road allowance, had to enjoin the defendants from using that portion of the lake that lies over the unopened road allowance.

McRuer, C.J.H.C., held that the plaintiff had failed to bring himself within the provisions of s. 471 of the Municipal Act, R.S.O. 1950 [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 445, *supra,* at p. 13.], and, at p. 384, he said,

> It may be that the evidence established that ... part of the road allowance ... has been fenced so as to incorporate with the plaintiff's lands that portion of the road allowance between the shore of the lake and the fence, but the fence, if any, that has been erected and maintained is in contravention of a municipal by-law which contains the following provisions: "That from and after the passing of this By-law, it shall not be lawful to place, erect, build or maintain, or cause to be placed, erected, built or maintained, any fence, timber, stone or other obstruction within the limits of any highway or road allowance within the Municipality ... "
>
> It may well be that this by-law was only intended to apply to those roads that were opened as public highways. However, the Surveys Act, R.S.O. 1950, c. 381, s. 9(2) provides that: "All allowances for any road ... laid out in the original survey of such ... township ... shall be public highways." Even assuming that the evidence establishes that the road allowance has been fenced off as contended for by the plaintiff, the fence not being lawfully there cannot be regarded as a fence at all, hence that portion of the road allowance is not within the statute so as to give the plaintiff any rights against members of the public entering upon it. The plaintiff therefore has no status to restrain the defendants from making lawful use of the water lying over the road allowance.

LANDS RESERVED FOR THE PURPOSES OF ROADS UNDER THE PUBLIC LANDS ACT

THE PUBLIC LANDS ACT, R.S.O. 1970, ch. 380, provides, in part, as follows,

> 65. Any part of the public lands that is a beach and is used for travel by the public is not by reason only of such use a highway within the meaning of any Act.
>
> 66.-(1) Unless the Minister otherwise directs, every patent, lease or licence of occupation issued under this Act shall contain a provision to the effect that the surface rights in any public or colonization road or highway crossing the land granted, leased or licensed are excepted therefrom.
>
> (2) Every patent, lease or licence of occupation issued under this Act shall reserve to the Crown such percentage, if any, of the surface rights of the land as the Minister considers necessary for road purposes.
>
> (3) Where in any patent, lease or licence of occupation heretofore issued under this Act or any predecessor thereof there is a reservation of a percentage of the land for road purposes and the rights with respect thereto have not been exercised before the 1st day of May, 1963, the reservation shall be deemed to be a reservation of the surface rights only.

67.-(1) In all sales, free grant locations, leases, licences of occupation, mining claims and other dispositions of public lands or mining rights, there shall be reserved to the Crown the right to construct on the land any colonization or other road or any road in lieu of or partly deviating from an allowance for road without making compensation therefor, and such right whether or not it is expressly reserved from the sale, location, lease, licence of occupation, mining claim or other disposition of the land or by the letters patent when issued shall be deemed to be so reserved.

(2) In all sales, free grant locations, leases, licences of occupation, mining claims and other dispostions of public lands or mining lands or mining rights, where the letters patent have been issued containing a reservation of any of the area for roads, wood, gravel and other materials required for the construction or improvement of any colonization or other road or of any road in lieu of or partly deviating from an allowance for road, may be taken from the land without making compensation therefor or for the injury thereby done to the land from which they are taken, and where the letters patent have been issued without a reservation being made of any of the area for roads, wood, gravel and other materials required for the purposes hereinbefore mentioned may be taken from the land, but compensation shall be paid as provided by THE EXPROPRIATIONS ACT.

(3) The rights mentioned in subsections 1 and 2 may be exercised by the Minister or by any person authorized by him to exercise them on behalf of the Crown.

(4) Where public lands over which a portage has existed or exists have been heretofore or are hereafter sold or otherwise disposed of under this or any other Act, any person travelling on waters connected by the portage has the right to pass over and along the portage with his effects without the permission of or payment to the owner of the lands, and any person who obstructs, hinders, delays or interferes with the exercise of such right of passage is guilty of an offence and on summary conviction is liable to a fine of not more than $100.

68.-(1) Where letters patent have issued for land that is in a municipality and the Minister is of opinion that the present and future needs of the locality as to roads are adequately provided for, he may, upon application of the owner of the land or any part thereof and upon payment of a fee of $25, make an order releasing and discharging the land or part from any reservation relating to roads mentioned in section 67 or in the letters patent.

(2) Where letters patent have issued for land that is in a municipality and contains a reservation of the right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, and the Minister is of the opinion that the reservation no longer serves a useful purpose or that the release of the reservation is in the public interest, he may, upon application of the owner of the land or any part thereof and upon payment of a fee of $25, make an order releasing and discharging the land or part thereof from the reservation.

(3) Any order made under subsection 1 or 2 may be registered in the proper land registry office.

No road allowances are laid down in the original survey of the unorganized Township of Hodgins in the District of

Algoma. In *The Crane Lumber Co. Ltd. v. Brisson et al., [1936] O.R. 457,* the plaintiff or its predecssors had laid out a road across the lands which it held, partly in fee simple and partly as lessee of the Crown. The Court of Appeal held that since 5% of all land patented or leased by the Crown is reserved for the purposes of roads under The Public Lands Act, R.S.O. 1927, ch. 35, sec. 59(1)(2), the plaintiff cannot complain because road commissioners, appointed pursuant to sec. 11 of The Statute Labour Act, R.S.O. 1927, ch. 239, locate a public highway along the ground previously occupied by a road of the plaintiff, so long as the commissioners limited the area to 5% of the land held in fee simple and to the same percentage of the part held under lease.

RESERVATIONS FOR ROAD ALLOWANCES IN MINING DISTRICTS

Where a mining location bordered on a lake or river in the unsurveyed territory within the districts of Algoma, Thunder Bay and Rainy River, and that part of the district of Nipissing which lies north of the French River, Lake Nippising and the River Mattawa, The Mines Act, 1892, 55 Vic. ch. 9, required that a road allowance of one chain in width be reserved along the margin of the lake or river. But where, in his opinion, the public interest would not be prejudiced, the Commissioner of Crown Lands was authorized to direct that such reservation was not to be made.

Section 109 of THE MINING ACT, R.S.O. 1970, ch. 274, is as follows,

> 109.-(1) Every patent or lease issued under this Act shall contain a reservation for road purposes of 10 per cent of the surface rights of the land granted or leased, as the case may be, and the Crown or its officers or agents may lay out and construct roads where considered proper or the lands so granted or leased.
>
> (2) Every patent or lease issued under this Act shall contain a reservation of the surface rights on and over any public or colonization road or any highway crossing the land granted or leased at the date of issue of the patent or lease.
>
> (3) Subsections 1 and 2 do not apply to patents or leases of mining rights only.
>
> (4) Where a patent or lease has been issued under this Act or any predecessor thereof containing a reservation for road purposes of 5 per cent or of 10 per cent of the lands granted, and the Crown or its officers or agents did not occupy lands under such reservation, prior to the 1st day of May, 1963, for laying out and constructing roads, such reservation shall now read as a reservation of 5 per cent of the surface rights or 10 per cent of the surface rights, as the case may be.

PART 3 - HIGHWAYS LAID OUT OR ESTABLISHED UNDER THE AUTHORITY OF ANY STATUTE

Section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads, in part, as follows,

> 399. Except in so far as they have been stopped up according to law, all highways laid out or established under the authority of any statute ... and all alterations and deviations of and all bridges over any such ... highway or road, are common and public highways.

Into this category fall the Quarter Sessions highways laid out or established under 33 Geo. III. ch. 4 and 50 Geo. III. ch. 1, and the toll roads and bridges laid out or established under the authority of special Acts of the Legislature and of The Toll Roads Act, R.S.O. 1914, ch. 210, and its predecessors, beginning with 12 Vic. ch. 84, being an Act to authorize the formation of Joint Stock Companies for the construction of roads, and other works in Upper Canada. [See Part 1.]

Other highways in this category are:-

COLONIZATION ROADS

Provision was made by An Act respecting Colonization Roads, 7 Edw. VII. ch. 17 [Assented to 20th April, 1907.], for the construction or repair of

> *(1)* such main or leading colonization roads as were deemed necessary in,
>
> *(a)* any unsurveyed or unorganized portions of the Province, or
>
> *(b)* organized townships where roads were required to give access through unoccupied or sparsely occupied districts, or through districts unfit for cultivation or settlement, and
>
> *(2)* such other roads as the Legislature, upon the recommendation of the Minister of Public Works, deemed necessary for the proper settlement and development of that portion of Ontario in which money was being expended in the building of colonization roads.

The Colonization Roads Act, 3-4 Geo. V. ch. 11 [Assented to 6th May, 1913.], repealed the former Act of 1907. The new Act and subsequent revisions thereof all had for their declared object the construction or repair of the same kinds of roads as were mentioned in the old Act. The Act was repealed by The Statute Law Amendment Act, 1947, 11 Geo. VI. ch. 101, s. 2.

ROADS FOR THE DEVELOPMENT OF NORTH AND NORTHWESTERN ONTARIO

The Lieutenant Governor in Council was authorized by The Northern and North-western Development Act, 1912, 2 Geo. V. ch. 2, to borrow up to $5,000,000. for making roads, among other things, in the north and northwestern districts of the Province.

In The Northern and North-western Development Act, 1912, as amended by The Northern and Northwestern Ontario Development Act, 1924, 14 Geo. V. ch. 14, the word "road" means a common and public highway and includes a street and a bridge

forming part of a highway, or on or over which a highway passes.

The Act empowers the Minister, i.e., the member of the Executive Council charged for the time being with the administration of the Act, for and in the name of His Majesty to purchase or expropriate any land necessary for the use, construction, maintenance or repair of a road, or for procuring stone, gravel, timber, or other material for use in making, maintaining or repairing a road, and the Minister has the like powers and may proceed in the manner provided by The Ontario Public Works Act where the Minister of Public Works enters upon or takes land or property for the use of Ontario, and the provisions of that Act apply *mutatis mutandis*. The Minister may exercise, within the limits of any municipal organization along the course of a road laid out, constructed, maintained or repaired under the Act, all the powers of a municipal corporation authorized to lay out, maintain and construct a highway and the Minister may lay out, construct, maintain or repair, upon land so purchased or expropriated, such road or roads as are deemed necessary or expedient.

The sections of The Northern and Northwestern Ontario Development Act, 1924, concerning the powers of the Minister to acquire lands and to construct, maintain or repair roads, were carried into The Northern Development Act, 1926, 16 Geo. V. ch. 10.

Section 6 of The Northern Development Act, 1926, created a Department of Northern Development, to be presided over by the Minister, and charged it with the administration of that Act and of The Returned Soldiers' and Sailors' Land Settlement Acts and The Colonization Roads Act.

The Northern Development Act, 1926, was consolidated and included in the Revised Statutes of Ontario in 1927 and 1937. The Act was not repealed, but it was not included in the Revised Statutes of Ontario, 1950.

HIGHWAYS ESTABLISHED AND LAID OUT BY BY-LAWS OF INCORPORATED MUNICIPALITIES

Section 443 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, provides, in part, as follows,

> 443.-(1) The council of every municipality may pass by-laws,
>
> *(a)* for establishing and laying out highways;
>
> *(b)* for widening, altering or diverting any highway or part of a highway;

PART 4 - ROADS ON WHICH PUBLIC MONEY HAS BEEN EXPENDED FOR OPENING THEM OR ON WHICH STATUTE LABOUR HAS BEEN USUALLY PERFORMED

Section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads, in part, as follows,

> 399. Except in so far as they have been stopped up according to law, ... all roads on which public money has been expended for opening them or on which statute labour has been usually performed ... and all alterations and deviations of and all bridges over any such ... road, are common and public highways.

THE STATUTE LABOUR ACT, R.S.O. 1970, is applicable to organized townships as well as to unorganized townships, unless a by-law to abolish statute labour has been passed by the council of the township.

In organized townships where statute labour has not been abolished, statute labour is to be performed by every male inhabitant described in section 5 of the Act and who has not commuted therefor when required by the pathmaster or other officer of the municipality appointed for that purpose.

The Act makes provision for the election of road commissioners in unincorporated townships and section 22 provides as follows,

> 22.-(1) The commissioners have power to open road allowances when they have been laid down in the original surveys, and where such road allowances are either wholly or partly impracticable, to lay out roads in lieu thereof and direct the performance of statute labour thereon, and, where no road allowances are laid down in the original surveys, but any of the area is reserved for roads, the commissioners may lay out roads where necessary and direct the performance of statute labour accordingly.
>
> (2) In cases of deviations from road allowances and of roads laid out where there are no road allowances as above provided, the commissioners shall cause a plan thereof, so far as the same affects ungranted lands of the Crown, to be made by an Ontario Land Surveyor and shall file the plan in the Ministry of Natural Resources, and the commissioners may pay the cost of preparing the plan out of any moneys received by way of commutation of statute labour.
>
> (3) In the case of a deviation passing over any patented improved land, the commissioners may pay to the owner of the land taken for the purpose of making the deviation the value of it as may be agreed upon between the commissioners and the owner, and in case of disagreement, THE EXPROPRIATIONS ACT applies.
>
> (4) Where the value of land taken has been agreed upon between the commissioners and the owner, the owner shall execute a conveyance of the land to Her Majesty in right of Ontario and such conveyance shall be registered in the proper land registry office.

ESTABLISHING A HIGHWAY AGAINST THE WILL OF THE OWNER OF THE LAND

If a public highway is to be established against the will of the private owner, it must be by expropriation in the manner provided for by the statute, with compensation; and cannot be accomplished, without compensation, by merely doing statute labour or expending public money upon it: *Point Abino Association v. Township of Bertie (1928), 61 O.L.R. 610.*

THE COMMON LAW METHOD OF ESTABLISHING A ROAD OR HIGHWAY

THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 450(1), (2), (3) and (4), as amended by Stat. Ont. 1971, Vol. 2, ch. 81, s. 5, is as follows,

> 450.-(1) No highway shall be laid out in any municipality without the sanction of the council of the municipality.
>
> (2) No highway less than 66 feet in width or, except in a city or town, more than 100 feet in width shall be laid out by the council of the municipality without the approval of the Minister or by any owner of land without the approval of the council of the municipality and of the Minister.
>
> (3) Nothing in this section affects THE PLANNING ACT.
>
> (4) Subsection 2 does not apply and has never applied to any lane laid out in the rear of lands abutting on another highway or to any outlet connecting such a lane with a highway.

In *Schraeder v. The Township of Grattan, [1945] O.R. 657,* the plaintiff claimed that a certain strip of land had been dedicated and accepted by the defendant municipality for the purpose of a road running from his farm to a nearby highway; that a passable road had not been constructed over the strip; that he, therefore, had no proper or convenient access to his farm and had thereby suffered damages.

The trial Judge found that in the year 1935, one Feely exchanged a strip of land 40 feet in width, already cleared and fenced, from the easterly side of lot 25 in the 18th concession of the township of Grattan, in the county of Renfrew, for an unopened road allowance between lots 25 and 26 in the same concession. The strip of land was conveyed to the township and the unopened road allowance was conveyed to Feely. Later, the township granted $50. to the plaintiff, the owner of a farm consisting of lots 25 and 26 in the 17th concession of the said township, towards the payment for work done by the plaintiff in the construction of a road on the strip in question. There was evidence that the township had also paid the men engaged by the plaintiff to work on the road; that the defendant had put in certain culverts; that a contractor had been instructed by the defendants to start construction of a passable road but without entering into a binding contract; and that the servants of the township had directed the plaintiff to do certain statute work on the strip of land.

The defendant municipality appealed, and Hogg, J., who heard the appeal, said,

> The principal defence of the municipality is that its powers are wholly statutory and that no by-law has been passed establishing a road, and as the provisions of s. 490 of The Municipal Act, R.S.O. 1927, c. 233, in force in 1935, had not been complied with [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 450, *supra*.], the defendant was and is under no obligation to construct or to repair or to maintain a road on the said 40-foot strip of land, nor has the plaintiff the right to maintain the present action, because of his failure to give the notice required (before bringing an action for damages sustained by reason of non-repair of a highway) by s. 469 [Now s. 427.].
>
> There is no evidence that a by-law was passed by the defendant

corporation, sanctioning the laying out of the roadway in question, nor is there evidence that because the proposed road is less than 66 feet in width, the approval of the Municipal Board was obtained according to the requirements of said s. 490 [Now s. 450.]. The Plaintiff argues that the common law method of establishing a road or highway by dedication and acceptance not only has not been abrogated by The Municipal Act, but is authorized by the statute, and that a by-law is required only where a highway is laid out or established by a municipality when it desires to open up a roadway as provided by certain sections of The Municipal Act.

Section 442 [Now s. 399.] of that statute sets out the manner in which public highways are constituted, and states, *inter alia*, that all highways laid out or established under the authority of any statute, or roads on which public money has been expended for opening them, or on which statute labour has been usually performed, and all roads dedicated by the owner of the land to the public use, shall be common and public highways.

It is said by Biggar in his Municipal Manual, 1900, at p. 806, that in Ontario, since the enactment in the year 1810 of the statute 50 Geo. III, c. 1, one of the classes of highways in this Province consists of roads dedicated by private owners and accepted as highways by or on behalf of the public.

In *Lockie v. Township of North Monoghan (1917), 12 O.W.N. 171,* in the Court of Appeal, Meredith, C.J.C.P. said: "The defendants denied responsibility in respect of this highway, on the ground that it had never been established by by-law of the council or otherwise assumed for public use by the corporation: Municipal Act, R.S.O. 1914, ch. 192, sec. 460(6) [Now s. 427(7).]. But the road was dedicated to the public by those who opened it; a deed to the township corporation was executed, and was registered by an officer of the corporation; some money was paid by the corporation for repairs done upon the road; and there was no evidence of any repudiation of these acts. Upon the acceptance by the defendants of the dedication of the land as a highway, the land vested in them, under the provisions of sec. 433 of the Act." [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 400, *infra*, at p. 119.]

In *City of Ottawa v. Grand Trunk R. W. Co.; City of Ottawa v. Ottawa and New York R. W. Co. (1921), 50 O.L.R. 239, 64 D.L.R. 337,* in the Appellate Division, where the question of dedication of land for a public highway was under consideration, Meredith, C.J.O., said at p. 248:

"It was contended by counsel for the appellants that what was done was ineffective because of the absence of a by-law of the council of the respondent corporation authorizing the diversion and of authority from the Railway Committee of the Privy Council to make it.

"In my opinion, the appellants are estopped by their acts and conduct from raising this objection. They have taken possession and are and have been since the diversion was made, occupying and using as their own what, in my view, was undoubtedly part of Nicholas street ... Although no by-law was passed authorizing the diversion, the respondent is bound by acquiescence, and could not now successfully set up the want of a by-law: *The Township of Pembroke v. The Canadian Central Railway Company (1882), 3 O.R. 503.*"

In *Township of Bertie v. Snyder et al., [1933] O.W.N. 43,* affirmed *[1933] O.W.N. 501,* in considering the question whether a road was a public highway, Logie. J. said that "Although there has been no municipal by-law accepting it as a road, in addition to dedication, user by the public and statute labour performed upon such parts as required the

same, public money has been for a long period of time expended upon Road 32." It was held that the road in question was a public highway.

In *Batt v. Village of Beaverton, 52 O.L.R. 159, [1923] 3 D.L.R. 424,* in the Appellate Division, Middleton J., at p. 162, stated the matter in the following language:

"Was the road dedicated by the owner to public use, i.e., to public use as a highway?

"Under the statute as it now stands it would seem to be necessary that there should be the sanction of the municipality, probably expressed by a by-law for the establishment of the road. At the time when, it is said this road was dedicated, I am ready to assume that there could be a dedication by an owner, as in England, by the opening up of a road with the intention on the part of the owner to dedicate it as a highway and an acceptance by public user as distinct from municipal action."

Middleton J. was referring to s. 479 of The Municipal Act of 1914, as enacted by 1914, c. 33, s. 20, which sets out, as does s. 490 of the 1927 statute [See now s. 450.], that no highway can be laid out without the sanction of the council of the municipality. In the same appeal Masten J., speaking of the question of dedication, said:

"In the second place, as to any acceptance by the municipal corporation, it is admitted that there is no by-law of acceptance, and that there is no plan filed by any owner shewing the lands in question to be laid out as a highway, ... The use necessary to evidence an acceptance of a dedication must be a use by the public of the land as a road."

The dictum of Middleton J., that it is probable that a by-law would be required to express the sanction of the municipality in the establishment of a road, does not appear to coincide with the opinion of Masten J., which contemplates that the sanction of the municipality can be given by proper acceptance. In all these cases where a road has been dedicated to public use, the sole judgment which suggests that a by-law might be required, to signify the sanction of a municipality, is that of Middleton J. in *Batt v. Beaverton.*

In *Palmatier v. McKibbon (1894), 21 O.A.R. 441* at *451,* it is said that "laying out" a road means laying it out on the ground by survey in the usual manner and declaring that as so laid out it is a public highway.

By s. 483(1) of the statute, the council of every municipality may pass by-laws "*(a)* For establishing and laying out highways". [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 443(1)*(a)*, at p. 20, *supra*.]

A highway under s. 442 [Now s. 399.], "laid out or established under the authority of any statute," would be a highway such as is contemplated by s. 483 [Now s. 443.], and would be a highway of the character to which s. 490 [Now s. 450.] would apply, because that latter section appears to contemplate only a highway to be "laid out". But s. 442 [Now s. 399.] provides also for roads that are not laid out, but are constituted roads because public money has been expended for opening them or because they have been dedicated by the owner of the land to public use. Such roads, not being of the class of roads which are laid out by statute, would not appear to come within, or to be affected by the terms of s. 490 [Now s. 450.], requiring sanction and approval by the Municipal Board.

Furthermore, s. 443 [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 400, *infra*, at p. 119.] speaks of the vesting of a dedicated highway, as apart from one established by by-law.

Section 469(6) of the Act speaks of a highway established by by-law "or otherwise assumed for public use by the corporation." [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 427(7), *infra*, at p. 39.]

I think it is to be concluded that a public road or highway dedicated to the public use does not come within the purview of s. 490 [Now s. 450.], for the reason that such road or highway is not one which is laid out as contemplated by ss. 442 and 483 [Now ss. 399 and 443.], and it is only a highway so laid out that requires sanction by by-law and is subject to the further terms of the said s. 490 [Now s. 450.].

There now remains for consideration the question whether the facts show that the 40-foot strip of land was established as a highway by dedication. This is a question of fact: *The City of Hamilton v. Morrison (1868), 18 U.C.C.P. 228*. Two essential elements are required: (1) intention on the part of the owner of the land to dedicate, and (2) an acceptance by the public of such road as highway.

In *Bailey et al. v. The City of Victoria et al., 60 S.C.R. 38, 54 D.L.R. 50, [1920] 1 W.W.R. 917,* Anglin J. said at p. 59:

"But in order to bring a highway into existence by dedication in addition to the intention of the owner of the soil to dedicate it to the public for that purpose, however directly evidenced, an acceptance by the public is also essential." See also *Macoomb et al. v. Town of Welland (1907), 13 O.L.R. 335.*

The negotiations between Feely and the plaintiff and the defendant corporation for the exchange of lands for a road, followed by a deed of conveyance of the 40-foot strip, fenced in and cleared, by the owner Feely to the defendant corporation, and a request to the defendant to have work done and money expended in the construction of a road upon this strip of land, show the intention on the part of the owner to dedicate the land for the purpose of a highway, and show, I think, that he did everything possible on his part to carry out such intention.

With respect to the matter of acceptance by the public, Middleton J. said in *Re Sanderson and Township of Sophiasburgh (1916), 38 O.L.R. 249* at *252, 33 D.L.R. 452:*

"In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication. This assent may be presumed from expenditure of public money upon the road, but it may be shown in other ways."

The requirements necessary to show acceptance are also mentioned in *St. Vincent v. Greenfield (1887), 15 O.A.R. 567,* where Osler J.A. said:

"If the road has been laid out and dedicated by the landowner, the performance of statute labour upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway by the municipality." This judgment is discussed by Rose J. in *Point Abino Association v. Township of Bertie, 61 O.L.R. 120, [1927] 4 D.L.R. 503,* affirmed *61 O.L.R. 610, [1928] 2 D.L.R. 31*. That the expenditure of public money is evidence of acceptance by a municipal corporation is laid down in *Lockie v. Township of North Monaghan, supra* [at p. 23], and *Reaume v. City of Windsor (1915), 8 O.W.N. 505.*

With respect to proof of acceptance by the defendant municipality and an assent on its part to the dedication on behalf of the public, there is the fact that the defendant exchanged a road allowance west of lots 25 and 26 for the 40-foot strip on the east side of the said lots, and there is evidence that the purpose of such exchange was that a road might be constructed over this 40-foot strip. There is evidence of the expenditure of public money on the said strip of land and evidence that the defendant directed that statute labour ... be done ... took steps to negotiate a contract for the construction of a road over the strip. Such acts would seem ... sufficient ... to establish acceptance.

PART 5 - ROADS PASSING THROUGH INDIAN LANDS

Section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads, in part, as follows,

> 399. Except in so far as they have been stopped up according to law, ... all roads passing through Indian Lands, ... and all alterations and deviations of and all bridges over any such ... roads, are common and public highways.

THE NATURE OF THE INDIAN TITLE TO LANDS IN ONTARIO

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A Royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris (10th February, 1763), by which His Majesty King George (the Third) erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever, which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, to reserve under Our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of Our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie: *per* Lord Watson, who delivered the judgment of the Judicial Committee of the Privy Council, in *St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 A.C. 46* at *pp. 53 and 54*.

The Royal Proclamation of 1763 was superseded in 1774 by the Imperial Statute, 14 Geo. III, c. 83, the *Quebec Act*. That Act was intended to provide for the permanent government of the newly acquired domain and extended the boundaries set out in the Proclamation "by fixing the interior boundaries on the lines now established as the western limit of Ontario" (per Boyd, C., in *R. v. St. Catharines Milling & Lumber Co. (1885), 10 O.R. 196 at p. 204)*.

The Six Nations (Indian Confederacy) resided south of the Great Lakes, primarily in what are now the States of New York, Pennsylvania and Ohio. In 1775, war broke out between the American colonies and Britain. Many (but not all) of the Six

Nations Indians fought for the British. Some tried to maintain neutrality. Some campaigned with the Americans. As it became increasingly clear that the British were losing the war, their allies from the Six Nations became increasingly anxious as to what would happen after the war, despite reassurances from Sir Guy Carleton, Governor of Quebec, and his successor (from 1778 to 1786), Sir Frederick Haldimand. There is little doubt that some of these assurances were intended to bolster the morale of the Indian supporters of the British cause at a time when their anxiety was justified.

The war ended in September, 1783. The treaty of peace contained no definitive provisions concerning the territorial rights of the Six Nations. Those Indians who had fought with the British, or even remained neutral, rightly discerned that they could no longer remain in what was now to be American territory. (The new boundary, as negotiated, was the middle of the Great Lakes.)

Joseph Brant, a highly intelligent, educated and influential Mohawk chief who had ably supported the British during the war, pressed the Governor and ultimately the authorities in Britain for definitive action implementing the promises made to the Six Nations that their loyalty would be rewarded. Consideration was given to creating an Indian settlement in the Cataraqui District, but ultimately Brant gave priority to the valley of the Grand River. (A minority in fact chose to go to the allotted site at the Bay of Quinte.)

... In May, 1784, Haldimand on behalf of the Crown purchased from the Mississagas a large tract roughly described as six miles deep on either side of the Grand River from Lake Erie to the head of the river. On October 25, 1784, he issued the "Haldimand Proclamation".

THE HALDIMAND PROCLAMATION, 1784

> Whereas His Majesty having been pleased to direct that in consideration of the early Attachment to His Cause manifested by the Mohawk Indians, & of the Loss of their Settlement they thereby sustained that a Convenient Tract of Land under His protection should be chosen as a Safe & Comfortable Retreat for them & others of the Six Nations who have either lost their Settlements within the Territory of the American States, or wish to retire from them to the British - I have, at the earnest Desire of many of these His Majesty's faithfull Allies purchased a Tract of Land, from the Indians situated between the Lakes Ontario, Erie, & Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such other of the Six Nation Indians as wish to settle in that Quarter to take Possession of, & Settle upon the Banks of the River commonly called *Ours* [Ouse] or Grand River, running into Lake Erie, allotting to them for the Purpose Six Miles deep from each side of the River beginning at Lake Erie, & extending in that Proportion to the Head of the said River, which them & their Posterity are to enjoy for ever.

Brant interpreted the Haldimand Proclamation as having two effects:

(i) - as being full national recognition of the Six Nations as an independent community;

(ii) - as a grant of the Grand River lands to the Six Nations in fee simple.

The British Government firmly resisted both propositions, and the Crown's position has never changed. At least some members of the Six Nations have perpetuated Brant's position. (The allegation of national sovereignty was made in this very action but abandoned at trial.)

Western Quebec was reorganized by the Constitutional Act of 1791 [R.S.C. 1970, Appendices, p. 139] as Upper Canada. In that year Colonel John Graves Simcoe was made Lieutenant-Governor of Upper Canada. He clashed almost at once with Brant over disposal by the Indians of any part of the Grand River lands. On January 14, 1793, Simcoe issued what is most often described as "Simcoe's Patent". ... ... The defendants herein choose to call it the "Simcoe Deed".

... Brant always refused to recognize the Simcoe Patent. He asserted it had no effect because the Haldimand Proclamation had already conveyed the fee simple to the Six Nations. ... It may be thought ironical that after 180 years, the hereditary chiefs take the position in this action that the very "deed" Brant and his successors repudiated is now said to have given the fee simple to the Six Nations. (It has long ago been authoritatively decided by the Courts that the Haldimand Proclamation did not do so.)

... ...

For the purposes of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the good will of the Sovereign". Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (*per* Lord Watson) in *St. Catharines Milling & Lumber Co. v. The Queen,* at *pp. 54-5,* and his statement of the legal position has been followed ever since.

The above statements are from the judgment of Arnup, J.A., who delivered the judgment of the Court of Appeal, in *Isaac et al. v. Davey et al. (1974), 5 O.R. (2d) 610.*

THE LEGAL ESTATE IN CROWN LANDS

By an Imperial statute passed in the year 1840 (3 & 4 Vict. c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, inter alia, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united Provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. ...

The Act of 1867, which created the Federal Government, re-

pealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the United Provinces, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims ... by the Dominion and the Province of Ontario ... (arising out of a formal treaty or contract concluded on the 3rd of October, 1873, between commissioners appointed by the Government of the Dominion of Canada, on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of 50,000 square miles in extent ... subject to the right of the Indians to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be reqired or taken up for settlement, mining, lumbering, or other purposes) are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

The above statements are from the judgment of the Judicial Committee of the Privy Council delivered by Lord Watson in *St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 A.C. 46.*

THE BENEFICIAL INTEREST IN SURRENDERED INDIAN LANDS

Section 108 (of the British North America Act, 1867) enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purposes of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of

appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for Provincial purposes, in terms of sect. 92(2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by sect. 109, is of material consequence. Sect. 109 provides that "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that, by sect. 117, it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect. 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces.
...

In the course of the argument the claim of the Dominion to the ceded territory (50,000 square miles of country surrendered to the Crown, of which 32,000 square miles is situated within the Province of Ontario) was rested upon the provisions of sect. 91(24), which in express terms confer upon the Parliament or Canada power to make laws for "Indians and lands reserved for the Indians." It was argued that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved

consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

... The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted (under sect. 91(24)) to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

... The commissioners (appointed by the Government of the Dominion of Canada) who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867.

... The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. ....

The above statements are from the judgment of the Judicial Committee of the Privy Council delivered by Lord Watson in *St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 A.C. 46.*

See also the decision of the Judicial Committee of the Privy Council in *Ontario Mining Company, Limited v. Seybold, [1903] A.C. 73.* In that case the dispute was between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The appellants claimed to be entitled under letters patent issued by the Dominion to their predecessors in title and the respondents claimed an undivided two-thirds interest in the same lands and minerals under letters patent issued to them by Ontario. The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty.

After the making of the treaty of 1873, the Dominion Government, in intended pursuance of its terms, purported to set out and appropriate portions of the lands surrendered as reserves for the use of the Indians, and among such reserves was one known as Reserve 38B, of which the lands now in question form a part. The Rat Portage band of the Salteaux tribe of Indians resided on this reserve.

On October 8, 1886, the Rat Portage band surrendered a portion of Reserve 38B, comprising the land in question, to the Crown, in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with

the provisions of a Dominion Act known as the Indian Act, 1880. But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arose.

It was argued for the appellants that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the Province of Ontario. This argument assumes that the Reserve 38B was rightly set out and appropriated by the Dominion officers as against the Government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of the Board (in *St. Catharine's Milling and Lumber Company v. The Queen (1888), A.C. 46)*. By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. The appeal was dismissed.

The Dominion Government entered into an agreement with the Government of Ontario which enabled them to fulfil the terms on the faith of which the surrender of 1873 was made. In the result, the choice and location of the lands to be appropriated as reserves could only be effectively made by the joint action of the two Governments. See 54 & 55 Vict. ch. 5 (Can.) and 54 Vict. ch. 3 (Ont.).

POWER AND AUTHORITY TO SELL, LEASE AND CONVEY SURRENDERED INDIAN LANDS

The Governments of the Dominion of Canada and the Province of Ontario, in order to settle all outstanding questions relating to Indian Reserves in the Province of Ontario, entered into an agreement, made the 24th day of March, 1924 and set out in the schedules to the statute entitled An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands enacted jointly by the Dominion as 14-15 Geo. V. ch. 48 (Can.) [Assented to 19th July, 1924.] and the Province as 14 Geo. V. ch. 15 (Ont.) [Assented to 17th April, 1924.]. The first clause of the agreement provides as follows,

> 1. All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands, provided, however, that in the event of the band or bands to which any such Reserve has been allotted becoming extinct, or if, for any other reason, such Reserve, or any portion thereof, is declared by the Superintendent General of Indian Affairs to be no longer required for the benefit of the said band or bands, the same shall thereafter be administered by, and for the benefit of, the Province of Ontario, and any balance of the proceeds of the sale or other dispo-

sition of any portion thereof then remaining under the control of the Dominion of Canada shall, so far as the same is not still required to be applied for the benefit of the said band or bands of Indians, be paid to the Province of Ontario, together with accrued unexpended simple interest thereon.

LEGISLATION ENACTED BEFORE CONFEDERATION

In *Byrnes v. Bown (1851), 8 U.C.Q.B. 181,* Robinson, C.J., said at *p. 184,*

> The 12th clause of the Highway Act, 1812, 50 Geo. III. ch. 1, enacts that any roads whereon public money has been expended or statute labour usually performed, or any roads passing through Indian lands, shall be deemed common and public highways. But it never could have been meant by that clause that every bye-road or short cut used by the Indians across the plains or flats was to be established as a permanent highway ... The meaning of that clause ... is, that roads which, under the provisions of that Act, were to acquire the character of legal highways, should have that same legal character where they passed through Indian lands as in other parts of their course, although they might not be (as to such portions of them) public allowances made in any original survey, nor had any public money been expended or statute labour performed on them.

WHO ARE INDIANS AND WHAT ARE INDIAN LANDS

The statute 13 & 14 Vict. ch. 74 [Assented to 10th August, 1850.], entitled "An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury," distinguished between Indians residing on Indian lands not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians, and those Indians who were seized in fee simple in their own sole right of real estate in upper Canada, the title to which was derived directly or through others by Letters Patent from the Crown and who were assessed in respect of such real estate to the amount of twenty-five pounds or upwards. The latter were excluded from the protection give to Indians by section 3 of the Act.

In *Totten v. Watson (1857), 15 U.C.Q.B. 392,* William John, an Indian, had made a deed in 1857 to the plaintiff, of land which the Crown had granted by patent to his grandfather, in his natural individual capacity, and which William John, the grandson, took by descent, as any other subject of the Queen in the Province would do. The only question to be determined was whether the statute 13 & 14 Vict. ch. 74, secs. 1 & 2, extended to this deed. That statute, entitled An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied by them from trespass and injury, enacts that no purchase or contract with the Indians, or any of them, shall be valid, unless made under the authority and with the consent of her Majesty, her heirs or successors, attested by an instrument under the great seal of the Province, or under the privy seal of the governor thereof for the time being.

Commenting on that, Robinson, C.J., said, at p. 395,

> If we construe this provision by itself and literally, it will extend to the deed made by William John ... but if we look at the scope and intention of the statute, we find ... that this enactment could only have been meant to extend to what are understood by the term "Indian lands," that is lands which the Crown

> has reserved for the occupation of certain Indian tribes, but of which the title is still in the Queen, and not to land which an individual Indian has acquired by purchase, devise, or inheritance, or by grant from the Crown made to himself as an individual.

Section 3 of the said statute 13 & 14 Vict. ch. 74, was restricted by the statute 20 Vict. ch. 26 [Assented to 10th June, 1857], entitled An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, to those Indians or persons of Indian blood or intermarried with Indians, who were acknowledged as members of Indian Tribes or Bands residing upon Indian Lands which had never been surrendered to the Crown (or which having been so surrendered had been set apart or were then reserved for the use of any Tribe or Band of Indians in common) and who themselves resided upon such lands and were not exempted from the operation of the said section 3 under the provisions of 13 & 14 Vict. ch. 74. Such persons only were deemed Indians within the meaning of the 13 & 14 Vict. ch. 74 or any other Act or Law in force in any part of the Province by which any legal distinction was made between the rights and liabilities of Indians and those of Her Majesty's other Canadian subjects and any Indian who was enfranchised under the Act, 20 Vict. ch. 26, was no longer deemed to be an Indian within the meaning of 13 & 14 Vict. ch. 74.

Section 2 of the statute 23 Vict. ch. 151, entitled, An Act respecting the Management of the Indian Lands and Property, [Assented to 30th June, 1860.] said,

> All lands reserved for the Indians or for any tribe or band of Indians, or held in trust for their benefit shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions.

PERFORMANCE OF STATUTE LABOUR BY INDIANS

Indians and persons inter-married with Indians, residing upon Indian lands and engaged in the pursuit of agriculture as their principal means of support were made liable to perform statute labour by the 5th section of the statute 13 & 14 Vict. ch. 74.

HIGHWAYS LAID OUT OR ESTABLISHED UNDER THE AUTHORITY OF ANY STATUTE

It was enacted by section 12 of the statute 12 Vict. ch. 84, entitled An Act to authorize the formation of Joint Stock Companies for the construction of Roads and other Works in Upper Canada, that if a road constructed by a company incorporated under that Act or by any other company theretofore chartered by Act of the Legislature for a like purpose should pass through any tract of land or property belonging to or in possession of any tribe of Indians compensation therefor was to be made to them. Every such road constructed at the expense of any such company was vested in the company and their successors by section 19 of the Act.

LEGISLATION ENACTED AFTER CONFEDERATION

Indians, and lands reserved for Indians fall among the classes of subjects within the exclusive legislative authority of the Parliament of Canada under section 91 of the British North America Act, 1867.

FEDERAL LEGISLATION

The legislation enacted before Confederation relating to roads passing through Indian lands constructed by road companies under authority of 12 Vict. ch. 84, and to the performance of statute labour by Indians under 22 Vict. ch. 81, were repealed by section 99 of the Indian Act, 1876, except only as to things done, rights acquired, obligations contracted or penalties incurred before the Act came into force on 12th April, 1876.

THE INDIAN ACT, R.S.C. 1970, ch. I-6.

Under this Act an Indian is a person registered as an Indian or entitled to be registered as an Indian and a reserve is a tract of land, the legal title to which is vested in Her Majesty, that has been set aside by Her Majesty for the use and benefit of a band. A "band" is described as a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of the Act.

SURRENDERS OF INDIAN LANDS

Section 37 of the Indian Act provides as follows,

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

A surrender to Her Majesty may be made of any right or interest of the band and its members in a reserve. The surrender may be absolute or qualified, conditional or unconditional, but, unless the surrender is made to Her Majesty and it is assented to by a majority of the electors of the band at a general or special meeting or by a referendum and accepted by the Governor in Council in accordance with section 39 of the Act, it is void.

LANDS TAKEN FOR PUBLIC PURPOSES

Section 35 of the Indian Act provides as follows,

> 35.(1) Where by an Act of the Parliament of Canada or a provincial legislature, Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be

paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

Section 34 of the Indian Act says,

34.-(1) A band shall ensure that the roads, bridges, ditches and fences within the reserve occupied by that band are maintained in accordance with instructions issued from time to time by the superintendent.

(2) Where, in the opinion of the Minister, a band has not carried out the instructions of the superintendent given under subsection (1), the Minister may cause the instructions to be carried out at the expense of the band or any member thereof and may recover the cost thereof from any amounts that are held by Her Majesty and are payable to the band or such member.

The council of a band is empowered by section 81 of the Indian Act to make by-laws which are not inconsistent with the Act or with any regulation made by the Governor in Council or the Minister, for, among other matters,

(f) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works;

(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(p) the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes.

PROVINCIAL LEGISLATION

Section 4 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, says,

4. The Minister or any person authorized by him may, without the consent of the owner,

(a) enter upon and use any land;

(b) alter in any manner any natural or artificial feature of any land;

(c) construct and use roads on, to or from any land; or

(d) place upon or remove from any land any substance or structure

for any purpose of this Part.

Section 62 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, provides that the Minister may arrange with the Government of Canada for the construction or maintenance, under the supervision of the county road superintendent and in accordance with the requirements of the Minister, of any road in a township or part of a township constituting an Indian reserve and, by subsection 3 of section 73 of the Act, [See p. 155, *infra*.] the Minister is authorized to arrange with the Government of Canada for the appointment of a road superintendent to supervise the construction and maintenance, in accordance with the requirements of the Minister, of the roads in any township or part of a township constituting an Indian reserve.

Except in so far as they have been stopped up according to law, all roads passing through Indian lands which were constructed by road companies and all other roads passing through Indian lands on which statute labour was usually performed by Indians prior to the 12th April, 1876, are public highways within the meaning of section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, and the soil and freehold in all such roads is vested in the municipalities having jurisdiction and control over them.

Highways constructed on lands acquired pursuant to subsection 3 of section 35 of the Indian Act, R.S.C. 1970, ch. 149, and section 4 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, are public highways vested in Her Majesty in right of the Province of Ontario.

PART 6 - ROADS DEDICATED BY THE OWNER OF THE LAND TO PUBLIC USE

Section 399 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads, in part, as follows,

> 399. Except in so far as they have been stopped up according to law, ... all roads dedicated by the owner of the land to public use, and all alterations and deviations of and all bridges over any such ... road, are common and public highways.

Strang v. Township of Arran (1913), 28 O.L.R. 106 (App. Div.). In this case the residents of the unincorporated village of Allenford, in the township of Arran, brought an action against the township for damages because of the non-repair of a highway known as Mill street and failure to replace a bridge which formerly stood upon Mill street where it crosses the Sauble river, in the village of Allenford, but which had been carried away by a freshet.

The plaintiffs alleged that Mill street, with the bridge formerly thereon, was the only practical highway to and from their lands situate on the south side of the river; and that, because of the non-repair of the highway and bridge, they had been damnified.

The defences were, that Mill street, with the bridge thereon, was laid out by private persons, and never became a public highway; and that, even if it did so become, the defendant corporation was not liable.

In delivering the judgment of the Court, Mulock, C.J., said, at p. 111,

> The question of dedication is one of fact. The registration of the plans shewing Mill street (The plan of the lands on the north side of the river was registered in 1868 and the plan of the lands on the south side was registered in 1881.); the specific reference on the plan of ... 1881, providing for its continuance southerly to ... (a lane running westerly); the sale of lands according to these plans; the uninterrupted user of Mill street by the general public as a highway since the year 1868; and the performance of statute labour on it over a considerable number of years: constitute unmistakably an offer of dedication. And the action of the council in ... voting money for the repair of the bridge, in causing those repairs to be done, and in paying therefor, are, I think, referable to one thing only, viz., acceptance of the offer of dedication, and constitute an assumption of the bridge and street for public user by the defendant corporation within the meaning of sec. 607 (of the Consolidated Municipal Act, 1903). [See now subsections 1 and 7 of section 427 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, *infra*.]

Subsections 1 and 7 of section 427 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, are as follows,

> 427.-(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to THE NEGLIGENCE ACT, is liable for all damages sustained by any person by reason of such default.
>
> (7) This section does not apply to a road, street or highway laid out or to a bridge built by a private person or by a body corporate

until it is established by by-law of the council or otherwise assumed for public use by the corporation.

In *Hislop v. City of Stratford (1916), 10 O.W.N. 430,* a vendor had dedicated land for the extension of a street and subsequently he sold the portion dedicated together with the adjoining land. The Court found that there was dedication and acceptance, and that the purchasers took the land with knowledge thereof, and had, since they became the owners of the property adjoining, by the payment of taxes for a sewer and otherwise, acquiesced therein. An application by the purchasers for a declaration that they were the owners of the land dedicated by the vendor for the extension of the street was dismissed with costs.

THE INTENTION TO DEDICATE

Whether there is an intention to dedicate is, of course, a question of fact. The intention to dedicate may be inferred from long user to the knowledge of the owner of the soil and without objection by him: *Regina v. Moss, 26 S.C.R. 322; Turner v. Walsh, 6 App. Cas. 636.* But it does not follow necessarily that long user by the public of a private road will result in its becoming a public highway by dedication. Each case depends on its own facts, and there may be a state of facts which will prevent the inference that otherwise it would be proper to draw from being drawn: *City of Ottawa v. Grand Trunk R.W. Co.; City of Ottawa v. Ottawa and New York R.W. Co. (1921), 50 O.L.R. 239; Reed v. Town of Lincoln, [1974] 6 O.R. (2d) 391.*

The burden of proof that an owner's land is subject to a right of highway rests on the municipal corporation, which asserts that it is subject to such right, notwithstanding that the municipal corporation may be the defendant in the action. Where there is no direct evidence as to the intention of the owner, the *animus dedicandi* may be presumed either from the fact that a highway has been maintained and repaired by the public body or from the fact of public user without interruption. In order that a public highway may be established by dedication two concurrent conditions must be satisfied: (1) there must be, on the part of the owner, the actual intention to dedicate; and (2) it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public: *Williams and Wilson Limited v. The City of Toronto and the Attorney-General for Ontario (1946), 21 O.R. 309.*

TRESPASS ROADS

No right by dedication can be held to have been gained by the public passing over the travelled roads, commonly called "trespass roads", used in lieu of unopened road allowances, and sometimes to save distance by a cross road, and at other places to avoid any obstruction, even trifling, which made the original allowances for roads laid out by the Crown Surveyors less easy or agreeable to pass over, while the fee was in the Crown. In the absence of sufficient evidence of dedication, a trespass road cannot properly be considered to have been a legal highway (even after 20 to 50 years user), so as to prevent its being inclosed by the owner of the lot when the public allowance laid out by the government was opened: *Regina v. Plunket (1862), 21 U.C.R. 536.*

In a new part of the country, or over an area of low land where persons would naturally look for the high places over which to travel, evidence of user of a road is not to be too readilly accepted as evidence of an intention on the part of the owner

to dedicate: *Dunlop v. Township of York (1869), 16 Gr. 216.*

No dedication can be presumed as against the Crown from the mere fact of user of a road ... But, as against the grantee of the Crown and those claiming under him, the user by the public for a period of thirty years, without objection or interference on their part, would furnish conclusive evidence of dedication: *Mytton v. Duck (1866), 26 U.C.R. 61.*

In *Macoomb et al. v. Town of Welland (1906), 12 O.L.R. 362,* the trial Judge found that there had been an uninterrupted user by the public of the strip of land in question as a road for a period of thirty-two or thirty-three years before the bringing of the action, which, he held, upon the authority of *Mytton v. Duck, supra,* was sufficient to establish a dedication. However, the Court of Appeal in *Macoomb et al. v. Town of Welland (1907), 13 O.L.R. 335,* reversed the judgment of the trial Judge. In that case, Moss, C.J.O., had this to say at p. 343,

> In *Mytton v. Duck* ... upon which the learned trial Judge chiefly if not wholly based his conclusion, the evidence was of continuous uninterrupted user for thirty years without objection or interference on the part of any person. There were no countervailing circumstances. And Draper, C.J., seems [in *Mytton v. Duck*] to have laid peculiar stress upon that state of facts as furnishing conclusive evidence of dedication. There also the origin of the road was obscure. No such circumstances or condition of affairs appeared as are apparent in this case *[Macoomb et al. v. Town of Welland]* and which quite distinguish it from the earlier case.

At p. 342, the Chief Justice referred to a principle enunciated by Parke, B., in *Poole v. Huskinson, 11 M. & W. 827 at p. 830.* The principle, which the Chief Justice said had since been frequently quoted and acted upon, is as follows,

> In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate - there must be an *animus dedicandi,* of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment.

In the *Macoomb* case there had been an agreement made in 1855 that the portion of the road in dispute should cease to be a highway when two other strips of land should be erected into highways. One of the new highways was unfit for use as a public highway and it was not opened for traffic until 1873 or 1874. After it was opened, it was used, but it appears not to have been in very good condition for traffic, and the use of the old roadway was not discontinued entirely. Traffic was divided between the old road and the new. The Chief Justice said, at p. 340,

> in view of the circumstances of the locality at that time, not much weight ought to be attached to this fact. The roads were clay and heavy and difficult for travel or traffic, particularly at some seasons of the year, and persons travelling upon them naturally sought the easiest way. It is reasonable to regard such user from the point of view to which expression was given by the late Chief Justice Spragge when Vice-Chancellor in the case of *Dunlop v. Township of York (supra).*

The user of the old road until 1873 or 1874 could not, in view of the agreement, be regarded as any evidence of intention to dedicate. And as to continuance of user thereafter, the

Chief Justice said,

> there is nothing upon the evidence to indicate that it was permitted in pursuance of an intention formed by the owner to dedicate that which had been acquired for the purpose of putting it out of existence as a public highway [in accordance with the agreement of 1855]. User originating as shewn in this case cannot be regarded as carrying as much weight as evidence of intention as user commenced and continued for a number of years with no qualified circumstances appearing. ... in the case of a road originally public but closed by municipal by-law with the intent of putting it out of existence as a public highway, ... the subsequent user by the public should be ... carefully scrutinized.

There was evidence that the owner had interfered with workmen attempting to work with a scraper or construct a culvert. This was held to be inconsistent with an intention on the part of the owner to dedicate. And it was certainly a most distinct assertion of right, quite inconsistent with an intention to dedicate.

Concerning work done on the way or track, according to the evidence, it was done sporadically and unsystematically. The payments made to the workmen were in compensation for their time in general, and there were no specific payments in respect of work done in the part of the municipality where the alleged road was located.

The Chief Justice referred to *Regina v. Rankin, 16 U.C.R. 304*, where it was shown that much statute labour and public money had been expended upon a way over a period of 10 years before the defendant was indicted for obstructing it. In that case, it was said by Sir John Robinson, C.J., at p. 310, that,

> The fact of the public using it for ten years, or expending money upon it ... is not sufficient to establish it as a lawful highway, against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication.

He also made reference to *St. Vincent v. Greenfield, 15 A.R. 567*, where Osler, J.A., delivering the judgment of the Court, said at p. 571,

> If the road has been laid out and dedicated by the landowner, the performance of statute labour upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway by the municipality, but the continued performance of statute labour upon a road which was in its inception a trespass road does not, ... by force of the statute absolutely make such a road a public highway. It may at most raise a presumption of dedication, or be evidence from which a dedication by the owner may be inferred, and may throw upon him the onus of rebutting such presumption or inference. I do not think it has any higher effect.

The Court of Appeal found that the owner never intended to, and did not, make any actual dedication of the way.

More recently, in *Reed v. Town of Lincoln (1974), 6 O.R. (2d) 391*, Martin, J.A., in delivering the judgment of the Court of Appeal, said, at p. 396,

> Evidence of the use of a road by the public is merely evidence from which the intent of the owner of the land to dedicate may be inferred. Such an intention ought not to be too readily inferred from the use by members of the public of a road traversing private property

> in a rural community, especially in a locality where the normal system of roads did not develop. In these circumstances the owner of the property may well, in a neighbourly spirit, permit local residents to use a way across it for their convenience without having any intention of dedicating the road as a public highway. The inference of neighbourly tolerance is the more likely when dedication is sought to be established at a period when the area is in a relatively early stage of its development.

Martin, J.A., referred to the following statement made by Bowne, L.J., in *Simpson v. Attorney-General, [1904] A.C. 476,* and quoted with approval by Lord Atkinson in *Folkestone Corp. v. Brockman et al., [1914] A.C. 338,*

> ... nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood.

DEDICATION BY THE CROWN

The Crown may dedicate as a private person may any lands for use as a public highway: *Regina v. Moss, 26 S.C.R. 322, 332,* following *Turner v. Walsh, 6 App. Cas. 636,* in which Sir Montague Smith, delivering the judgment, said,

> The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user of a way by the public, whether the land belongs to the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.

In *O'Neil v. Harper (1913), 28 O.L.R. 635 [Appellate Division],* the plaintiff's action was for a declaration: (1) that a road which crosses the south half of lot 7 in the 2nd concession of the gore of Chatham is a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon that highway; (3) for an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by the defendant upon the plaintiff in attempting to prevent the plaintiff from travelling upon that highway.

The trial Judge, having found that there was a public highway by dedication, as claimed by the plaintiff, but that he had not suffered peculiar damage, dismissed the Plaintiff's action, but without costs. The matter was appealed and the following excerpts are from the judgment of Clute, J., with whom the other Judges who heard the appeal concurred,

> After a careful perusal of the evidence, I do not think that there is much doubt as to the main facts. The lands in the neighbourhood of the alleged road are very low; and, until a system of drainage was introduced, about 1882, the greater portion was submerged at certain seasons of the year and unfit for cultivation, except a very restricted area thereof. The higher lands were found to be along the creek, and from the earliest recollection of the oldest inhabitants, there was a road, or trail from Wallaceburg westerly to the St. Clair river. This trail followed the southerly bank of Running creek until it reached a point near the dividing line between lots 8 and 9. It then crossed the creek by a bridge, and followed the northerly bank of the creek in

a south-westerly direction across lot 8 and the south-east corner of lot 7, crossing the road allowance between concessions 1 and 2, about 18 chains west of the dividing line between lots 7 and 8, crossing the concession line and following the northerly bank of the creek in a south-westerly and westerly direction to the St. Clair river.

In 1879, a bridge was built over Running creek, where it crosses the road allowance between concessions 1 and 2, south of lot 7, and work was done in improving this road allowance. About this time, the drainage system was inaugurated, and some 5,000 acres in this vicinity reclaimed. The result was, that allowances for roads on the concession-lines and side-lines were now in a condition to be made passable, and work was done upon them, and, as this work proceeded, the new roads came more and more into use.

In 1880, or shortly after, the road allowance between concessions 1 and 2 was made passable, and the old road across lots 8 and 7 was less used, although it continued to be used, more or less, without any gates, fences, or other obstructions across it, until 1896. In that year one Summers purchased the farm owned by the plaintiff (lot 8) from one Stewart, and erected two gates, one between lots 8 and 9, on his easterly line, and another between lots 7 and 8 on his westerly line, and as he says, "I put in the two gates for my own convenience, to allow people to travel through, never to stop the traffic."

After 1896, it would appear, from the evidence, that there continued more or less travel upon the old road, persons desiring to use the same opening and closing the gates. Public traffic would appear to have grown less and less as the concession roads and side-lines were put in proper repair.

The evidence clearly established ... that from the earliest settlements in that vicinity, prior to 1850 and probably before 1845, the road in question formed part of the only and regular thoroughfare from Wallaceburg west to the St. Clair river.

For many years, the pumping house, erected in connection with the drainage operations between lots 8 and 9, was reached by the old road, and wood and other fuel taken in that way. The Canada Company received a patent of lot 7, with other lands, in 1846, and the trial Judge finds that this road was used as a public highway long before the grant by the Crown to the Canada Company.

The Township of Chatham passed a by-law to close a portion of this road, and the Town of Wallaceburg passed a by-law purporting to close another part at the eastern end of the road, though the latter by-law speaks of "the original allowance for road," which seems inapplicable to the road in question.

With reference to the Canada Company, the trial Judge finds that the inference is warranted that they knew of this road, and of its user by the public, if not before, very soon after, the grant to them;" and concludes, as to this branch of the case, that, "if the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway."

Land dedicated to the public for the purpose of passage becomes a highway when accepted for such purpose by the public: *Regina v. Petrie (1885), 4 E. & B. 737;* but whether, in any particular case, there has been a dedication and acceptance, is a question of fact and not of law.

"It is not correct to say that the early user established an inchoate right capable of being subsequently matured ... The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses:" *Turner v. Walsh (1881), 6 App. Cas. 636, 642.*

"Dedication necessarily presupposes an intention to dedicate:" Halsbury's Laws of England, vol. 16 p. 33.

"A dedication must be made with intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to dedication, if there be an agreement which explains the transaction:" *per* Lord Denman, C.J., in *Barraclough v. Johnson (1838), 8 A. & E. 99, 103,* quoted with approval in *Simpson v. Attorney-General, [1904] A.C. 476, 493, 494.*

As a rule, such intention is a matter to be inferred by the jury in the light of the surrounding circumstances: *Rex v. Wright (1832), 3 B. & Ad. 681.* Acceptance may be inferred from public user, and requires no formal act of adoption, even where the road becomes *ipso facto* repairable at the public expense: *Rex v. Inhabitants of Leake (1833), 5 B. & Ad. 469; Roberts v. Hunt (1850), 15 Q.B. 17.* Open and unobstructed user by the public for a substantial time is, as a rule, the evidence from which a jury are asked to infer both dedication and acceptance: Halsbury's Laws of England, vol. 16, sec. 43, p. 34. An intention to dedicate can only be inferred against a person who is absolute owner in fee simple and *sui juris: ib., sec. 44.*

In *Regina v. Inhabitants of East Mark (1848), 11 Q.B. 877,* at p. *882,* Lord Denman, C.J., said: "If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I knew who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible."

In *Turner v. Walsh, 6 App. Cas. 636, supra,* it was held that dedication from the Crown or private owner, as the case may be, may and ought to be presumed from long-continued user of a way by the public, whether the land belongs to the Crown or to a private owner, in the absence of anything to rebut the presumption; and the same presumption should be made in the case of Crown lands in the Colony of New South Wales (and, therefore, in Ontario), although the nature of the user and the weight to be given to it may vary in each particular case. In the *Turner* case, the land was purchased from the Crown in 1879, under an Act passed in 1861. It appeared that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the plaintiff which had been used by the public with carriages and on foot, and was the main road between two places. The mail coaches travelled the road, and teamsters conveying the produce of the country used it; and, in fact, it had been used by the public for all purposes, during this period, without interruption. The Privy Council held that upon such evidence the Judge would be right, unless there was some positive restriction on the power of the Crown, in directing the jury that they might presume a

dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown or to a private owner, as the case may be, and, in the absence of anything to rebut the presumption, may and indeed ought to be presumed. (See, however, *Rae v. Trim, 27 Gr. 374*, where Blake, V.-C. held that a party in possession of Crown lands, before patent issued, could not dedicate any portion of the same.)

"If property is under lease, of course there can be no dedication by the lessee, to bind the freehold:" *per* Patterson, J., in *Regina v. Inhabitants of East Mark, 11 Q.B. at p. 883;* for during the lease, the freeholder could not interfere with persons permitted by the tenant to cross the land: *Baxter v. Taylor (1832), 4 B. & Ad. 72.* If the land has been in the occupation of a series of tenants, the assent of the freeholder may properly be presumed, for at each change of tenancy the landlord might have interfered: *Rex v. Barr (1814), 4 Camp. 16; Halsbury's Laws of England, vol. 16, sec. 47.* "Even when the land has been in lease during the whole period of user proved, still earlier user and a dedication at some time prior to the commencement of the lease may be presumed, if the evidence is not inconsistent with it:" ib. "On the determination of a tenancy the freeholder must assert his right to stop any public user without delay, for if it be allowed to continue he may be taken to have acquiesced in it:" *Rugby Charity Trustees v. Merryweather (1790), 11 East 375, n.*

Clute, J., said that applying the principles laid down in the cases discussed by him there was evidence upon which a jury might and ought to find, as the trial judge did find, a dedication of the road in question. He said that this view was strengthened by the fact that the Municipalities of the Townships of Chatham and Wallaceburg considered it necessary to take proceedings to close portions of the road by by-laws; that these were public acts, and showed how the question was regarded by the public, acting through their official representatives. In accepting this as evidence of reputation, he referred to the *Barraclough* case *(supra, p. 45)*, in which he said that it was held that action taken at a public meeting was evidence of reputation upon an issue as to whether or not certain land was a common highway. The fact that the mail was carried over this road for many years was also regarded as evidence.

What also weighed with Clute, J., was the nature of the land through which the road passed. He said,

The question should be considered as it existed down to the time when action was taken to drain the lands. The policy of the Legislature was first evidenced by the Drainage Act; and dedication, if it took place at all, was long prior thereto. The case differs, I think, from that of a partially settled country, where roads are used across private property until the authorized public roads are opened; for, in that case, even long user does not always raise a presumption of intention to dedicate on the part of the owner of the lot.

Every one knows that, as soon as the roads on the side-lines between the concessions are opened, the ways of convenience across the lots may be abandoned.

But here, from the condition of the lands, the case is different. The presumption is, I think, the other way. It can scarcely be supposed that the owners of the lots had in mind a possible future policy of the Legislature, and only intended to permit the road being used for a temporary purpose.

> Upon the facts of this case, I agree with the trial Judge that the road in question became a public highway by dedication.
>
> This being so, the subsequent opening of the concession-lines and side-lines, and the gradual diversion of the traffic to these better roads, did not, in my opinion, have the effect of destroying the character of the road in question. The common law rule, "once a highway, always a highway," applies, until by legal means its character is destroyed, although the long-continued existence of an obstruction may tend to shew that there never was a highway. See Halsbury's Laws of England, vol. 16, sec. 103.

The Court then went on to consider the question, did the plaintiff suffer such damage, peculiar to himself, as entitled him to bring the action. The Court found that the plaintiff had suffered that peculiar and special damage which entitled him to bring the action and allowed the appeal, setting aside the judgement for the defendant, and directing judgment to be entered for the plaintiff, and granting an injunction restraining the defendant from continuing any obstruction to the highway across lot 7.

THE TITLE OF A MORTGAGEE

A mortgagor in possession cannot defeat his mortgagee's title by giving the land to the public: *Batt v. Beaverton, [1923] 3 D.L.R. 424, 52 O.L.R. 159; Hunsinger v. Simcoe, [1946] 2 D.L.R. 632,* affirmed by the Supreme Court of Canada in *Hunsinger v. Simcoe, [1948] 3 D.L.R. 224*. In the latter case the Court found that there had been dedication and acceptance of a strip of land as a lane and public thoroughfare by the municipality prior to the mortgage. At the time the municipality ceased to tax the lane, it thereby evidenced its intention to accept the offer of dedication. It would appear too that public money was expended on the land and extensive work was done by the municipality.

PART 7 - DEVIATION ROADS FORMING BOUNDARY LINES BETWEEN MUNICIPALITIES

MAINTENANCE OF BOUNDARY LINES AND BRIDGES ON BOUNDARY LINES

The Municipal Act provides a complete scheme for the maintenance of boundary lines between municipalities, including counties and local municipalities in a provisional judicial district; for the erection and maintenance of all necessary bridges over rivers, streams, ponds or lakes forming or crossing boundary lines between two or more counties, or between a county and a city or a separated town, or between two or more local municipalities in a provisional judicial district.

DEVIATION ROADS

Section 425 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, reads as follows,

> 425. Where, on account of physical difficulties or obstructions existing on a boundary line between municipalities and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened that does not follow the course of such boundary line throughout, but in some place or places so deviates from it as to lie wholly within one of the municipalities, such road shall nevertheless be deemed to be, for the purposes of this Act, the boundary line between the municipalities, and a river, stream, pond or lake that crosses it where it deviates shall be deemed to be a river, stream, pond or lake crossing a boundary line within the meaning of this Act.

The above section is substantially the same as section 458 of The Municipal Act, 1913, 3 & 4 Geo. V. ch. 43, which was a redraft of subsection 2 of section 617 of The Municipal Act of 1903, 3 Edw. VII. ch. 19, which read as follows,

> 617.-(2) A road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of the municipalities, provided that such deviation is only for the purpose of getting a good line of road, and a bridge built over a river, stream, pond or lake crossing such road where it deviates as aforesaid shall be held to be a bridge over a river, stream, pond or lake crossing a boundary line within the meaning of this section.

In *Township of Euphrasia v. Township of St. Vincent (1916), 36 O.L.R. 233,* a miller had constructed a better road for his customers and it was subsequently adopted by the municipality as a public road, but it was held by the Appellate Division, reversing the judgment of the trial Judge, that it was not a deviation road and this was affirmed by the Supreme Court of Canada.

Riddell, J.A., said, at p. 242,

> The question whether this can be called a deviation of the town-line depends on the wording of the statute 3 & 4 Geo. V, ch. 43, sec. 458 - R.S.O. 1914, ch. 192, sec. 458.
>
> This section first appears in 1885; 48 Vict. ch. 39, sec. 22, introducing a new section, 535, in place of the former sec. 535 of (1883) 46 Vict. ch. 18. This referred solely to the duty of county councils to erect and maintain bridges over rivers forming or crossing boundaries between two municipalities - and (sub-sec, (2)) "a

road which lies wholly or partly between two municipalities shall be regarded as a boundary-line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of such municipalities, and a bridge built over a river crossing such a road where it deviates as aforesaid shall be held to be a bridge over a river crossing a boundary-line within the meaning of this section," i.e., solely for the purpose of defining the duty of the county. This next appears (unchanged) as R.S.O. 1887, ch. 184, sec. 535(1), (2); again with some slight changes in R.S.O. 1897, ch. 223, sec. 617(2); and then 3 Edw. VII. ch. 18, sec. 131, introduced the proviso, "provided that such deviation is only for the purpose of getting a good line of road."

The change made by 3 & 4 Geo. 5. ch. 43, sec. 458, is substantial: (1) the provision is made "for the purposes of the Act," and no longer "within the meaning of this section;" and (2) it is no longer "a road which lies wholly or in part between two municipalities" where the deviation is, to get a better line of road, which is provided for; but only "where, on account of physical difficulties or obstructions existing on a boundary-line ... and in order to obtain a better line of road, a road has been heretofore or is hereafter laid out and opened which does not follow the course of such boundary-line throughout," does the section apply. The law is now more inclusive in that the provision is effective for all purposes of the Act and not simply of the section; less inclusive in that only such roads are provided for as have been or may be (a) "laid out and opened" (b) on account of physical difficulties or obstructions and (c) in order to obtain a better line of road. Formerly it was wholly immaterial why the "deviation" came into existence so long as the road "lies ... between the municipalities" and the deviation "is ... within one of the municipalities" "only for the purpose of getting a good line of road" - and that is why so little is said or made of the origin of the road in *Township of Fitzroy v. County of Carleton, 9 O.L.R. 686,* although not wholly disregarded *(see p. 692)* - and why it is "the present condition of the deviation, and not its past history or origin," which "is to be regarded," because "the getting of a good line of road seems now to be the sole purpose of this deviation" *(p. 694)*. At that time there must have "come a time when it is no longer a question of origin" *(p. 697)* - now the origin is all-important.

So too in *County of Wentworth v. Township of West Flamborough 26 O.L.R. 199,* "its origin and history are of less consequence than the facts existing when the question arises, when the main inquiry must be, is the road now a public highway, and is it in fact serving the public purpose which a road upon the original road allowance would have served?

We are untrammelled by authority and we have no assistance from decisions of the Courts on the interpretation of the present section.

It seems to me that the section necessarily implies that some competent authority must be laying out and opening a road intended to follow in the main the course of the boundary-line; that, in the course of such laying out and opening, the road "does not follow the course of the boundary-line throughout," but, "physical difficulties or obstructions" appearing in part of the boundary-line, "in order to obtain a better line of road," it is laid out and opened so as to deviate, so "as to lie wholly within one of the municipalities." "It is the road that may deviate ... that is to say, the road that was intended to run on the line may (accidentally

by reason of inaccurate surveying, or) purposely in order to shun some obstacle (or for some other cause), get off the line:" *per* Patterson, J., in the Supreme Court of Canada, *County of Victoria v. County of Peterborough (1889), Cameron's Supreme Court Cases 608,* quoted by Boyd, C., in *County of Wentworth v. Township of West Flamborough, 23 O.L.R. 583, at p. 589* (the words in parenthesis are inapplicable here).

Looking now at the all-important matter, i.e., how the road was "laid out and opened," it is plain that it was not "laid out and opened" with the intention of following the boundary-line even in part; that it did not and was not intended "in some place or places" to deviate from the boundary-line. It was not a deviation, whatever else might be said for it, even assuming that the adoption of the road by the township could be considered a ratification of Walter's actions.

In *Township of Kenyon v. Township of Charlottenburgh (1922), 53 O.L.R. 22 (appeal dismissed, 24 O.W.N. 138) at p. 26,* Mowat, J. said,

> ... three deviations were used for over 80 years by the northerly inhabitants of Charlottenburgh to get to the market town of Apple Hill, to the west, and to a lesser extent to Alexandria, to the north-east. The deviations were treated by everybody as permanent public highways, taking the place of the original road allowances, unopened owing to swamps and hills. The houses of the inhabitants were built along these deviations, and they form the main arteries. There are 31 farm-houses north of these roads across the township and 10 farm-houses south of the deviated roads, or 41 in all. There are no houses adjacent to the unopened road allowances which have been taken into the farms for cultivation purposes. The people of Charlottenburgh used these deviated roads, although they did not maintain them, until that township itself built a stone road between the 8th and 9th concessions, and this is so good a road along which to get to the towns that the people of that township have become indifferent to the deviated roads in Kenyon, which originally were for their convenience. And now, when Kenyon says, "The burden of keeping up these old deviated roads which took the place of the original road allowances should be shared between us," Charlottenburgh replies, "Maintain your own roads," and consequently this litigation.
>
> The change in the law by adding as an ingredient before municipal liablility of an adjoining township can be adjudged, that there must be difficulties or obstructions, was referred to by Riddell, J., in *Township of Euphrasia v. Township of St. Vincent (1916), 36 O.L.R. 233,* and the case was affirmed by the Supreme Court of Canada, where Mr. Justice Riddell's remarks were especially approved. ...
>
> The *Euphrasia* case was an attempt to make the other township pay for a private road assumed as a public highway, although the private road was laid out not for boundary purposes as a deviation - but for commercial reasons. In the present case we have the records of antiquity to shew that these deviations were made and were acquiesced in by the inhabitants of both townships and used by them as the only way in the front of Kenyon and rear of Charlottenburgh by which people would get out to their world. The reason for the deviation was undoubtedly the difficulties and obstructions of the physical contour; and, although the evidence of these is less strong with regard to the western deviation ... yet, in view of their age and the fact that the physical condition when the roads were made are beyond the memory of man, and no direct evidence or

records which shew fully what was almost certainly the fact can be got, I hold that all these were authorized deviations.

The certified copies of road reports were admitted, as I recollect it, without objection, but old public surveys are admissible: *Sturla v. Freccia (1880), 5 App. Cas. 623, 624.*

The long delay of Kenyon in making a claim for contribution is a matter for comment, but I am unaware of any principle on which it can form a prevention of success here; and, in my view of the fact that these old roads were at one time unhesitatingly used by the Charlottenburgh people to get outside their township to markets, I think they should contribute to their maintenance, and it will be so declared.

In *Re Township of Middleton and Township of Dereham (1916), 10 O.W.N. 11,* Mulock, C.J.Ex., said,

Dereham sought to compel Middleton to pay a portion of the cost of opening up and maintaining what was originally a part of the boundary-line road allowance between the counties of Oxford and Norfolk, and to that end was endeavouring to have the matter referred to arbitration under the Municipal Act.

Middleton contended that, because of the adoption by the two counties of a deviation, the portion of the road allowance now called in question ceased to be part of the boundary-line road between the two municipalities, and that therefore it was not now liable to any of the cost of opening or maintaining it.

The two townships adjoin each other, Dereham being situated in the county of Oxford, and Middleton in the county of Norfolk. The original road allowance in question between the two townships was so cut up by streams that it was impracticable to construct upon it a good line of road, and in 1868 the two counties, by by-laws of their respective councils, adopted a deviation as a public highway, and constructed the deviated road, and continuously thereafter, for a period of over 40 years, maintained it at joint expense.

In or about the year 1910, Dereham, being desirous of opening up that portion of the original road allowance in lieu of which the two townships had provided the deviation, sought to compel Middleton to contribute towards the cost, and at the same time ceased to contribute towards the cost of maintaining the deviated road. Thereupon Middleton, in 1911, made application to the Ontario Railway and Municipal Board for an order declaring that the deviated road had, by the two counties, been established, constructed, and maintained in lieu of the original road allowance, and had thus become the county-line between the two townships, in lieu of the original county-line, and that the two townships were jointly liable for its maintenance. Thereupon the Board dealt with the application, and their order, bearing date the 11th September, 1911, declared that the deviated road "is now and has been a deviation of the county boundary-line between the township of Middleton, in the county of Norfolk, and the township of Dereham, in the county of Oxford, in lieu of the original county boundary-line, which was never opened up owing to the difficulties of construction, and this Board doth further order that the said townships of Middleton and Dereham shall keep up and maintain said deviated road in equal portions."

The action of the respective councils of the counties of Oxford and Norfolk in adopting the deviation in question had the

effect of shifting the original road allowance, whereby the deviation became the boundary-line in lieu of the original road allowance. Thus the latter ceased to exist as a road allowance between the municipalities.

In *Township of Fitzroy v. County of Carleton (1905), 9 O.L.R. 686,* the law then applicable was the Municipal Act of 1903, 3 Edw. VII. ch. 19. Subsection 2 of section 617 of that Act is fully set out on page 49, *supra*. There may be some doubt in view of the present section 425 of The Municipal Act, also set out on page 49, *supra,* whether the facts before the Court in this case would lead to the same result were the same facts before the Court for consideration today. Be that as it may, the case does stand for certain other propositions the validity of which remain unaffected by the present section 425 of The Municipal Act.

The following statement of facts and the judgment of the trial Judge, Falconbridge, C.J.K.B., are taken from the judgment of Garrow, J.A., at p. 689,

> The Madawaska River in its course towards the Ottawa River flows easterly in the township of McNab until about a mile westward from the junction of the boundary line between Pakenham and Fitzroy with that between these townships and McNab, when it sharply crosses the boundary between Pakenham and McNab, then proceeding easterly crosses the boundary between Pakenham and Fitzroy and again as sharply turns northerly and easterly and regains its original course through the county of Renfrew by crossing the boundary line between Fitzroy and McNab.
>
> It is therefore obvious that if the original boundary lines are to be opened, no less than three expensive bridges in close proximity would be necessary, namely, one between the townships of Pakenham and Fitzroy, one between the townships of Pakenham and McNab, and one between the townships of Fitzroy and McNab. None of the boundary lines in question has ever been opened throughout across this loop and none of these bridges has ever been built, although the neighbourhood has been settled for many years.
>
> The present situation upon the ground is that the obstruction caused by the loop in the river is overcome by a highway built and maintained around the southerly side of the loop, commencing at the east in the boundary line between the townships of McNab and Fitzroy and ending in the west in the boundary line between the townships of McNab and Pakenham, this having been apparently the order of its construction, that is from east to west. The boundary line road between the townships of Pakenham and Fitzroy was opened up at a later date and apparently ends when it joins the other first mentioned road.
>
> The exact origin of the east and west road around the loop is not at all clear. There was in the early days a mill at or near the bridge in question over the Waba stream in the township of Fitzroy, and at least a portion of the road now in question, possibly all of it in the township of Fitzroy, owes its origin to the efforts of private individuals to reach this mill. And the other portion, namely that through the township of Pakenham around the bend had apparently a somewhat similar origin in that it too was originally a mere trespass road. Then the council of the township of Fitzroy passed a by-law to establish a road to the Pakenham boundary line in the line, if not upon the exact site, of the old trespass road and also of the present travelled road, on the 12th of December, 1853. And the township of Pakenham passed a similar by-law to establish a

road from that boundary line to the boundary line between Pakenham and McNab, also upon or near the site of the older trespass road, on the 1st of November, 1854, thus completing the loop around the bend and giving a continuous highway from east to west. ...

Such then appears to be the history of the highway in question; first, mere trespass roads, followed by municipal recognition, and by user by the public for a period approaching fifty years, while the original allowances for roads during all these years remained and still remain unopened and incapable of use as thoroughfares by reason of the absence of the bridges required to cross the river.

Upon this road around the bend, since the passing of the by-law before mentioned, the townships of Pakenham and Fitzroy have from time to time expended public money in repairs and improvements, and statute labour has been done upon this as upon the highways in the vicinity.

About five years before the trial the two townships united in joint action at or near the boundary line to alter and somewhat shorten the road so as to avoid a gully and improve the road. And this is apparently the only joint action in evidence by any of the several municipalities interested from the beginning.

The learned Chief Justice [the trial Judge, Falconbridge, C.J.K.B.] found that the road around the loop or elbow before described is a deviation for the purpose of getting a good line of road; and that the departures to the north-west and north-east of the road forming the boundary between the townships of Fitzroy and Pakenham are also deviations for the same purpose, and that both deviations were made as substitutes for the possible roads on the respective boundary lines, and were made for the purpose of obtaining a good line of road in view of the obstructing course of the Madawaska River and of the comparatively enormous expense in the matter of bridge construction and otherwise, and adjudged the relief asked for by the plaintiffs against all the defendants.

Osler, J.A., who dissented, would have allowed the appeals of both Lanark and Renfrew. At page 690, he said,

This case appears to me to be one of considerable difficulty and I have not been able to satisfy myself that the township of Fitzroy has any right of action.

There is no ground for saying that the same road, according to the way in which it is approached can be a deviation from roads on two distinct and separate boundary lines, running, as in this case at right angles to each other. If the road in question is a deviation at all it must be either of a road on the boundary line between Carleton and Renfrew or of that on the boundary line between Renfrew and Lanark. It cannot be of both, so as to make two of the counties liable for a bridge over a river crossing it as a deviation from a road on the boundary line between them, and also one of these and a third county liable for the same bridge, treating the road as a deviation from a road on the boundary line between the two latter.

Maclennan, J.A., said at p. 693,

The road on which the bridge in question stands, instead of following the boundary from the north-east to the south-west, between Renfrew and Carleton, deviates therefrom, first southerly and then westerly, for about 1,500 yards, wholly within the county of Carleton, passes into Renfrew [Lanark], and finally reaches and

rejoins the original boundary or allowance, at a further distance of about 1,500 yards. The bridge is 1,000 yards from the county of Lanark and about 300 yards from the boundary line. The boundary line opposite to this deviation has never been opened throughout owing to its being crossed twice by the Madawaska river, and the necessity for the construction of two bridges at very great expense. It is plain, therefore, that this road having regard to its relation to the boundary line, and to the purpose which it has served for many years, and apart from its origin, and from the proviso contained in sub-sec. 2, is a deviation of the boundary line. It is said that it was originally opened as a road to a saw-mill, which was erected where the bridge now stands. However that may be, it has for more than fifty years been a public highway established by by-law of the county of Carleton, and by the expenditure of public money and statute labour thereon.

The formidable difficulty is the proviso in the statute of 1903. Is it a deviation only for the purpose of getting a good line of road? Words evidently copied from the judgment of Robinson, C.J., in *In re Brant and Waterloo (1860), 19 U.C.R. 450, at p. 457*. What is a good line of road? I should say it must be serviceable, convenient, easy of construction and repair. This road possesses these qualities. Then is it a deviation, a line chosen in preference to some other line, and so involving comparison with the original line. The deviation must be owing to some obstacle presented by the other line. Can it be doubted that the *raison d' etra* of this deviation, begun more than half a century ago, when the inhabitants were few and poor, and maintained to this day, without any attempt, or even proposal, to erect the two expensive bridges required to open the boundary, was only for the purpose of getting a good line of road, that is a line serviceable, convenient, easy of construction and repair, and which avoids very expensive obstacles? I think that cannot be doubted. Nor is it immaterial that the provision uses the word *is* and not *was*, apparently intending that the present condition of the deviation, and not its past history or origin, is to be regarded and the getting of a good line of road seems now to be the sole purpose of this deviation. The original allowance for obvious reasons is not a good line of road, and therefore this line used instead.

Upon the whole, therefore, I think the judgment is right so far as the county of Renfrew is concerned.

At first sight there appears to be considerable force in the view adopted by the learned Chief Justice that just as this road, starting on the boundary road between Renfrew and Carleton and running south-westerly, is an obvious deviation from that boundary road, so may and must it be regarded as a deviation from the boundary between Lanark and Carleton running northerly, diverging as it does from that and going north-easterly to avoid the Madawaska river, where it crosses that boundary road. But a deviating road must plainly come back, and have been intended to come back, at some point in its course, to or at all events near to the original road deviated from. The line in question does not, and could not, come back and rejoin or come near to the line between Lanark and Carleton from which, according to the hypothesis, it is a deviation or a divergence. I therefore think, with great respect, that the judgment is wrong in holding the bridge to be a bridge on a stream crossing a road forming a boundary line between Carleton and Lanark.

At p. 696, Garrow, J.A., said,

When the road in question (the deviation road between Carleton and Renfrew) was first opened township boundary lines, forming also county boundary lines, were under the exclusive jurisdiction of county councils. See 12 Vict. ch. 81, secs. 19 and 41, sub-sec. 11, and C.S.U.C., ch. 54, sec. 339. And undoubtedly if no road at all had been opened joint action would have been necessary in the manner pointed out in the Municipal Act, which has, I think, from the beginning always contained the requisite machinery in case of disagreement to compel joint action where there was a joint duty. But this is the case of a highway already opened and in long and well established use, and the real question in my opinion is not so much as to its actual origin as to its use by the public. Nor is it denied that in fact the road serves the purpose of connecting and is in fact the only means on the ground of connecting, the highways which have been opened to the east and to the west of it upon the true boundary line. And it is equally beyond question that the river is a very serious obstacle to opening up the true boundary line, quite sufficient to justify a deviation. Sec. 617, sub-sec. 2, mentions expressly a "road," not a road allowance, and this would, I think, include a road the public title to which had been acquired by dedication, or even whose legal origin was unknown, or if known was proved to have been for some temporary or merely local purpose, providing it had finally become a public highway and had in fact been adopted and accepted by the municipalities interested and had been used and was being used as a deviation of the original road allowance for the purpose of acquiring a good line of road: See *In re McBride and York (1871), 31 U.C.R. 355; O'Connor v. Otonabee (1874), 35 U.C.R. 73,* at p. 85, where the very same learned Judge who decided the case of *in re McBride and York* (the late Sir Adam Wilson) used this language: "A county council may accept a road as dedicated by a private person, although there was no by-law signifying such acceptance;" he having previously said in *In re McBride and York,* which was a case of dedication of a deviation road between two townships, "It is not necessary that the road between townships should consist of original road allowance only. Such roads may be acquired or may be added to by purchase or by dedication, as in other cases, and when once established by any lawful means it is a road for all purposes, and subject to the common incidents and law applicable to highways in the particular locality in which they are situated."

The question is really one of fact. The municipal corporations are charged with the duty to open up and maintain highways for the convenience of the public. The duty in the present case was jointly vested in the counties of Carleton and Renfrew, and neither of them as corporations apparently did anything, but they both knew, that is the inhabitants knew, from the beginning that this road was being opened, and that it was gradually as the years passed assuming its final character of an apparent deviation road to avoid the river. They could have intercepted this by opening up the true boundary line or some other road in lieu of it, but they preferred, wisely I think, to do nothing, because the road now in question satisfactorily served the public purpose and so absolved them from their duty in the premises.

Must there not come a time when it is no longer a question of origin in such a case? I certainly think there must, and that time is long past in the case of the present highway which was in my opinion long ago accepted and adopted by the municipalities interested as in fact a boundary line road, although not upon the

true boundary line, and a boundary line road so accepted and adopted by them for the purpose of obtaining a better line of road than upon the true boundary line.

MacLaren, J.A., agreed with Garrow, J.A.

Note: (1) The actual origin of the road in *Township of Fitzroy v. County of Carleton* was not regarded as very important, but then the law was different from what it is today. It may be, if the case were being heard today, the application of section 425 of The Municipal Act, R.S.O. 1970 to the facts would produce a different result. (2) A deviating road must plainly come back, and have been intended to come back, at some point in its course, to or at all events near to the original road deviated from. (3) A road can be a deviation of one boundary line road only.

PART 8 - EASEMENTS AND PRIVATE ROADS

SOME PRIVATE RIGHTS DISTINGUISHED FROM PUBLIC RIGHTS

The case of *Jackson v. Town of Stonewall, [1917] 3 W.W.R. 1 (Man. K.B.)*, concerned land marked "park for athletic sports" on a registered plan of subdivision. The question before Curran, J., was whether the land so marked had been dedicated to the public.

Curran, J., was of the opinion that the onus of proof of dedication, admittedly resting upon the defendant, had not been satisfactorily met and discharged.

The plaintiff admitted that he had sold and conveyed to third parties all of the lands abutting upon streets surrounding the lands in question. In the opinion of Curran, J., these acts of the plaintiff created rights in the grantees which entitled them to the continued use and preservation of the alleged park as laid down and shown upon the plan according to which they purchased. These rights were purely in the nature of private rights, founded upon a grant or covenant, quite apart from any dedication to the public. Before any public rights could attach to the park it was necessary to show in addition to an intention to dedicate, an express or implied acceptance of the dedication evidenced either by general public user or by acts of the public authorities.

Curran, J., felt that the words "park for athletic sports" were uncertain in scope, object and intention, but assuming they did indicate an intention to dedicate, the plaintiff by granting a lease for a term of years before any public user could have been established which would amount to acceptance had clearly evinced an intention against dedication sufficiently strong to override any intent which could be inferred in favour of dedication from the use of the words in question on the registered plan. Furthermore, he found that the plaintiff had exercised acts of ownership and dominion over the land in question after the surrender of the lease which were inconsistent with the right of public user and indicated an absence of intention to dedicate. He said "Such acts of course could not prejudice any private rights the purchasers ... may have had or still have."

The proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shown upon the plan adjoining the lots sold, which places them beyond the vendor's future control to their injury was referred to by Burton, J.A., in *In re Morton and The Corporation of the City of St. Thomas (1881), 6 Ontario App. Rep. 323, at p. 329.* The learned Judge said that it was admitted upon the argument (in that case) that the mere registration of such a plan would not conclude the owner or confer any rights upon the public. Patterson, J.A., said, in the same case, that when they (the Registry Acts) assume to make registered plans binding, that effect extends only to the subdivisions as recognized in registration, and to titles acquired by conveyances in conformity with registered plans.

In *Gooderham v. The City of Toronto (1894), 25 S.C.R. 246,* a mortgagee, having foreclosed the mortgagors' equity of redemption, enclosed the mortgaged land together with other lands including an unused private road the property of one Smith, all as laid down on a plan of subdivision of parts of a township lot then

in the City of Toronto, in one pasture field. The consent of the mortgagee to the registration of the plan had not been obtained and he was entitled to abandon the plan wholly so far as it purported to affect the lands described in the decree of foreclosure and two final orders bearing date the 17th day of January, and the 27th day of June, 1861. He had no right, of course, to enclose the other lands, but the only person who had any right or interest in law to dispute such action was Smith; and the estate of Smith was liable to be defeated by dispossession for the period limited for making an entry upon or bringing an action for the recovery of real estate.

The Real Property Limitation Amendment Act, 1874, 38 Vic. ch. 16, passed on the 21st December, 1874, enacted that as to all persons resident in the Province of Ontario no person after the first day of July, 1876, should make any entry or bring any action or suit to recover any land, &c., but within ten years next after the time at which the right to make such entry or to bring such action or suit should have first accrued. The mortgagee and his successors, having remained in exclusive possession of the pasture field including the unused private road for some 30 years prior to the passing in 1887 of the Surveys Act, 50 Vic. ch. 25, sec. 62, which provided that

> All allowances for roads, streets or commons surveyed in cities, towns and villages or any part thereof which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, etc., have been or may be sold to purchasers shall be public highways, streets and commons;
> ...

acquired an indefeasible estate of inheritance in fee simple to the lands registered in the name of Smith, including the private road.

The action was instituted by the plaintiff Gooderham to restrain the city of Toronto from entering upon and trespassing upon the lands enclosed in the pasture field.

Gwynne, J., who delivered the judgment of the Supreme Court of Canada, said, beginning at page 258,

> Sections 524 and 531 of the Ontario statute 46 Vic. ch. 18, which are but re-enactments of similar sections which had been in force ever since the passing of the act of the late province of United Canada in 1858, viz., 22 Vic. ch. 22, secs. 300, 322 and 323, were enacted for the purpose of determining and defining what roads were public roads and the rights and liabilities of municipal corporations in respect thereof. 46 Vic. ch. 18 enacts as follows:
>
> > Sec. 524. All allowances made for roads by the crown surveyors in any town, township or place already laid out, and also all roads laid out by virtue of any statute or any road whereon the public money has been expended for opening the same or whereon the statute labour has been usually performed, or any roads passing through the Indian lands, shall be deemed common and public highways unless where such roads have been already altered or may hereafter be altered according to law.
> >
> > Sec. 531. Every public road, street, bridge and highway shall be kept in repair by the corporation and in default of the corporation so to keep in repair the corporation shall besides

being subject to any punishment provided by law be civilly responsible for all damages sustained by any person by reason of such default but the action must be brought within three months after the damages have been sustained.

2. This section shall not apply to any road, street, bridge or highway laid out by any private person, and the corporation shall not be liable to keep in repair any such last mentioned road, street, bridge or highway until established by by-law of the corporation, or otherwise assumed for public user by such corporation.

The act then repeats sec. 1 of 13 & 14 Vic. ch. 15, as still in force as follows:

The right to use as public all roads, streets and public highways, within the limits of any city or incorporated town in the province shall be vested in the municipal corporation of such city or incorporated town (except in so far as the right of property or other right in the land occupied by such highways have been expressly reserved by some private party when first used as such roads, streets or highway and except as to any concession road or side road within the city or town where the person now in possession or those under whom they claim have laid out streets in such city or town without any compensation therefor in lieu of such concession or side road.).

From these sections it appears to be clear, 1st, that the right of the public or a municipal corporation to use as a public highway a road or street laid out by a private person on his own property applied only to such roads or streets as were in actual use as private roads or ways to property purchased by parties, and fronting on such roads or streets.

2nd. This right was qualified by such reservations as might have been made by the person laying out such road or street when first used as such road or street, showing very clearly, I think, that the user of such road or street as a private road or street was an essential condition precedent to the public or the municipality being in a position to acquire a right to use it as a public highway.

3rd. A private road so in use was liable to be made a public road or highway by the application of public money for keeping it in repair and in a condition fit to be used, but until so converted from a private road or street into a public road or street the municipality were by 46 Vic. ch. 18, sec. 531, declared to be under no responsibility to keep it in repair, or liability to persons injured by its not being kept in a sufficient state of repair. In fine there must have been a private road or street in actual existence and used as a private road in order to its being converted into a public road or highway.

It should be observed that at the time of the passing of the Surveys Act, 50 Vic. ch. 25, s. 62, title to the inclosed pasture field had vested in Gooderham, and no part of that inclosure could have been acquired for public use as a public road, street or highway, except by way of expropriation and payment of compensation for land taken for the purpose. The section applied only to roads or streets which at the time of the passing of the Act were then already in existence as private roads, to the use of which purchasers of property abutting thereon were then entitled. Such roads and streets were, subject to the proviso as to the non-liability of the corporation to keep the same in repair, converted by that section into public highways. In the

result, the appeal by Gooderham from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court, by which a perpetual injunction to prevent the city from entering on the land was refused, was granted.

The purchaser of a lot fronting or abutting on a street according to the plan of subdivision by which the lot and street were laid out acquired an easement over the street but subject to the right of the public to make it a public highway by acceptance of the dedication offered by the proprietor: *Sklitzsky v. Cranston, 22 O.R. 590.*

The non-user of these rights or easements acquired by purchasers of lots on a plan and the occupation of the street on which the lots front as part of the farm of the adjoining land owner ever since the plan was registered, do not result in the loss of these rights or easements. Consequently there is no bar under the statute (Limitations Act) for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an abandonment. Mere non-user is not of itself an abandonment, but is evidence with reference to abandonment: *Mykel v. Doyle (1880), 45 U.C.R. 65; Ihde v. Starr (1909), 19 O.L.R. 471, (1910), 21 O.L.R. 407 (C.A.); Jones v. Township of Tuckersmith (1915), 33 O.L.R. 634 (App. Div.) at pp. 652 and 653; Midanic v. Gross, [1957] O.W.N. 35 (C.A.).*

Where a subdivider elects not to dedicate the streets, etc., on his plan of subdivision to the public and the streets, etc., are clearly marked "Fee in road not dedicated", the subdivider will remain the owner of the soil and freehold in the streets, etc., subject to whatever easements are acquired by purchasers of lots fronting on those streets: *Re Tremaine and Corbett et al. (1975), 10 O.R. (2d) 129.*

Clearly the criterion of dedication is intention; but it is also clear that only an owner can dedicate: See *B. W. Powers & Son Ltd. v. Town of Trenton, [1967] 2 O.R. 432.* Laskin, J.A., as he then was, delivered the judgment of the Court and, at page 441, he said, "If, as is the case here, the land shown as streets was not owned by that person (the subdivider), then I do not see how this impropriety can found a public right under the statute." The statute referred to was The Registry Act, R.S.O. 1960, c. 348, s. 86(5).

That brings us to the case of *Wright and Maginnis v. The Corporation of the Village of Long Branch, [1959] S.C.R. 418.* In that case, a subdivider of land had included a ten acre parcel of land which was the property of another person in a plan of subdivision of his own lands in error. Part of the ten acre parcel was laid out on the plan as part of Long Branch Avenue and the remaining part was laid out as a square. There was therefore no dedication of any part of the disputed land under the statute by reason of Plan M-9, registered in 1886, or through sales of lots by reference to it. The Court found that there had been a previous dedication at common law of the part laid out as part of Long Branch Avenue independently of the plan and the municipality could not claim title through the statutory effect of Plan M-9. In 1932, a war memorial was constructed on the square under a purported permission of the municipality. The owner's permission was not obtained nor was there any evidence that he had been consulted. The owner died in January 1932 and his widow, the executrix and sole beneficiary of

and under his will died in December of that same year. The majority of the Supreme Court of Canada felt that it was improbable that this memorial could have been constructed without the acquiescence of the widow or continued without that of her successors in title. What was done in 1932 was characterized by the Court as a dedication of the land for a limited purpose, namely, the erection and maintenance of a war memorial; but it did not effect a transfer of the legal title in fee. The ownership of the fee remained in the appellants, subject to the right of the public to enter upon the land and to the right to maintain the memorial. The Court held that if, through the exercise of power conferred by law, the memorial is removed from the land or ceases permanently to exist, the object and duration of the dedication will have come to an end and the land will stand free of the burden.

Rand, J., who delivered the majority judgment, said, at page 422,

> The principle determining the nature of the interest created by dedication is analagous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place; the user for that object cannot be changed except by legislation; and if by authorized action its use as a market is abandoned, the beneficial interest revives in the original actor or his successors. ...

Commenting on the decision of the Court of Appeal in England in *In re Ellenborough Park (1955), 3 W.L.R. 892, (1956), Ch. 131, 159,* which affirmed the judgment of Dankwerts, J., holding that a right to the "full enjoyment" of a pleasure ground may exist as an easement appurtenant to neighbouring dwelling houses, Rand, J., said at page 423, "This is an analogous and striking extension of private right behind which public interests of similar genre have never been allowed to lag. ..."

In *Re Lorne Park (1913), 30 O.L.R. 289, affirmed 33 O.L.R. 51 (C.A.),* the petitioner claimed to be the owner in fee simple in possession of certain lots and subdivisions according to a plan of subdivision of Lorne Park filed in the registry office ... as amended by a subsequent plan ... subject only to certain charges or incumbrances.

Purchasers of lots in Lorne Park from the predecessors in title of the petitioner claimed to be entitled to free access to all the streets, avenues, terraces, and commons of the said park, and to free ingress and egress for themselves and their respective families, servants, and agents, with horses and carriages or other vehicles, to and from their said lands by any of the streets or avenues in the said park, and to free ingress and egress to and from the said park at any wharf or wharves in front thereof.

The predecessors in title of the petitioner, both orally and in printed circulars promoting the sale of lots in the park, referred to "A splendid square of about 25 acres ... set apart for picnics and sports." On the faith of these statements, a number of lots were sold. The lots were described simply by their number according to the registered plan. Each conveyance contained the following clause:-

> And it is hereby agreed that the party of the second part, his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to all the streets, avenues, terraces, and commons of the said park; and shall have free ingress and egress for himself and themselves, his and their family or families, servants and agents with horses and carriages, or other vehicles, to and from the said lands by any of the streets or avenues in the said park; and, subject as aforesaid, shall have free ingress and egress to and from the said park at any wharf or wharves in front thereof.

The claimants (purchasers) contended that their conveyances gave them some right with respect to the three parcels (25 acres) which prevented the petitioner (owner) from being declared to be the owner in fee simple without some qualification.

The right of the claimants (purchasers) to the streets, avenues and unenclosed portions of the park was conceded and did not need to be discussed. But Middleton, J., said, at page 294,

> The first question calling for consideration is the meaning of the expression contained in the deed by which it is stipulated that the grantee "shall have free access to the streets, avenues, terraces, and commons of the said park." The claimants contend that this word "commons" should be taken to include the three parcels in question. The owner, on the other hand, contends that this is not the true meaning of the word, ...
>
> It is quite true that this word "commons" is not used in its more strict and literal sense, but it is a flexible word; and in *Municipal Council of Sydney.v. Attorney-General for New South Wales, [1894] A.C. 444,* the Privy Council had no difficulty in giving it a meaning wide enough to cover that which is contended for by the claimants here. There certain lands had been dedicated as a permanent common. The question was whether this created a common or pasturage only. It was held that it did not. Lord Hobhouse says (pp. 453, 454): "The word 'common,' it is true, has a technical meaning in England and in New South Wales; though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something more. Standing alone it is an ambiguous term which requires explanation, and which may be explained by circumstances. But further, it is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people. And the question is whether it has been so used in this instance. It appears to their Lordships that there are several considerations, some more and some less cogent, all bearing the same way ... The omission to name commoners, or in any way to define the nature of the common, is more consistent with the intention of leaving the enjoyment a variable thing and open to all comers, than to give it to a defined class which, even if a large one, must be limited. The contiguity of the land to a populous city suggests that other modes of enjoyment are more suitable than pasturage."
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> ... ...
>
> It may be that the term "dedicate" is only appropriate where the right is conferred upon the public; here no public right was contemplated, nor do I think it was given, because those to be benefited were not the public but the purchasers of the different lands; indeed, I think it would be unprofitable to enter into a

> discussion to ascertain whether the right claimed can properly be called an easement, or whether it created an implied obligation in the nature of a restrictive covenant, because it seems to me that all this is more a question of terminology than of real substance. The main question remains: was it the intention of the parties that these parcels should be set apart and held as recreation grounds for the use of those who might buy lots upon the faith and strength of the scheme put forward by the vendors?
>
> ... ...
>
> I quite appreciate that there is room for distinction between cases in which there has been a dedication to the public, and the public right is being asserted, and cases such as this, where there is not in strictness any public right; but the allegation is that a private right has been conferred upon the individuals who purchased relying upon the scheme propounded by the vendors. It may well be that these cases may be more aptly likened to the class of cases in which the Court has been called upon to deal with building schemes.
>
> ... ...
>
> The cases cited mostly arise upon plans, but the principle is of wider application, and includes all cases in which the land is sold upon what may be called a "building scheme," a scheme by which a part of the entire tract is set apart by the vendors for the benefit of the purchasers. When this is shewn, either by indications found upon a plan used in making the sales or otherwise, the vendors cannot depart from the plan or scheme which was the foundation of the sales. This may be regarded as an implied covenant, and implied grant of an easement, and equity in the nature of an easement, or it may rest on the principles of estoppel. In any case, the property so dedicated or quasi-dedicated is rendered subject to the rights held out to the purchasers as an inducement to purchase. These rights may exist in perpetuity.
>
> ... ...
>
> Reliance was placed on the Registry Act as avoiding the claimants' rights under the deeds in question. No evidence was given to shew that the present owner is a purchaser for value without notice: *Barber v. McKay (1810), 19 O.R. 46.* On the contrary, he took with knowledge of the infirmity of title, and cannot complain.

In the result, the petitioner's appeal failed. All three parcels were in the same position and the claimants succeeded.

In *Ihde v. Starr (1909), 19 O.L.R. 471 [D.C.]* the plaintiff and the defendant each purchased and had conveyed to them certain lots according to a registered plan of a subdivision named Crescent Beach. The defendant occupied with her house, grounds and roads part of a space marked "No thoroughfare. Private entrance for exclusive use of occupants of lots in Crescent Beach tract;" and part of an area marked "Park Private Reserve" on the registered plan of subdivision.

The plaintiff's action was brought on behalf of herself and "all other the property holders at Crescent Beach ..." and an injunction was sought to restrain the defendant from obstructing or interfering with in any way or preventing or hindering the plaintiff and all others the property owners at said Cres-

cent Beach in the free and uninterrupted use and enjoyment of said park private reserve and said private entrance to lots for the exclusive use of occupants of lots in Crescent Beach tract, by the placing or erecting a dwelling or building or structure thereon or otherwise howsoever, and to compel the defendant "to remove said dwelling, building, or structure, and plants, shrubs, and other things, off the said park private reserve and private entrance to lots for exclusive use of occupants of lots in Crescent Beach tract now thereupon placed there by the defendant or at her instance."

By her statement of defence the defendant claimed title to the land of which she was in possession, by length of possession, and in the alternative claimed the benefit of the statute as to improvements made under mistake of title.

The trial Judge dismissed the action. The plaintiff appealed and the appeal was heard by a Divisional Court. The judgment of the Court was delivered by Meredith, C.J. Beginning at the bottom of page 477 he said,

> It is for me difficult to understand how an intelligent woman, which the respondent is, could have been the victim of such a series of mistakes as, according to her testimony, occurred, and much more than the uncorroborated statements of the respondent and her husband would, in my judgment, be requisite to entitle her to have the conveyances reformed so as to carry out what she alleges the transactions between her and the association (Crescent Beach Association) really were, and to effect what she asserts was the real purpose of them.
>
> Even if, as between her and the association, a case for the reformation of the instruments of conveyance has been made out, and she was in equity the owner of the land which she claims to have purchased from the association, her equitable right cannot prevail against the appellant, who claims under a registered conveyance.
>
> I find no evidence to support a finding that the appellant purchased with such notice of the respondent's equitable right, if any she had, as is required to defeat the appellant's registered title. All that is shewn is that the appellant had notice that the respondent was in possession and had made valuable improvements on the land over which the appellant claims the right she is seeking to enforce in this action, and that is not sufficient to entitle the respondent's equitable interest to prevail against the appellant's registered title: *Grey v. Ball (1876), 23 Gr. 390; Roe v. Braden (1877), 24 Gr. 589; McVity v. Trenouth (1905), 9 O.L.R. 105, per* Osler, J.A. at p. 110.
>
> If the respondent is to succeed, she must, in my opinion, do so on her defence based on the Statute of Limitations.
>
> That the respondent's possession for ten years is not sufficient to bar the right of the appellant to the easements claimed by the latter, we are bound to hold on the authority of *Mykel v. Doyle, 45 U.C.R. 65;* that decision has been questioned, but has never been overruled, though I am bound to say that if the matter were *res integra* (An affair on which no action had been taken, or deliberation had.) I should be of the same opinion as Armour, J., who delivered a dissenting judgment in that case.

The judgment of the trial Judge was reversed, but the operation of the injunction was suspended for a year to enable the respondent to remove the obstructions complained of.

PRESCRIPTIVE RIGHTS OF WAY

In *McIlmurray v. Brown, [1954] O.W.N. 121*, the plaintiff and the defendant were the owners of adjoining properties. There was a mutual side drive 6 feet 6 inches wide and extending 56 feet west from the street between the houses. It was impossible for the plaintiff to get a car into his garage on the north-west part of his property over the mutual right of way without encroaching to some extent for a distance of about 10 feet on the property of the defendant. The garage was built about 1920 and the plaintiff asserted a prescriptive right of way over the defendant's land.

Judson, J., said, at pages 122 and 123,

> What must be proved by a plaintiff asserting a prescriptive claim under the Statute of Limitations admits no doubt. He must prove uninterrupted enjoyment as of right for a period of twenty years immediately previous to and terminating in some action in which the right is called in question: *Watson v. Jackson (1914), 31 O.L.R. 481, 19 D.L.R. 733; Adams v. Fairweather (1906), 13 O.L.R. 490.*
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> ... ...
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> ... the plaintiff has proved user during the periods 1927 to 1930 and 1935 to 1952, the date of the institution of the action ... during the period 1930 to 1935 there was a cessation of user except for two periods, each about a fortnight in duration, ... Such a user, even if it did occur - and of this I am very doubtful - was of such an occasional character that it could give no indication to the owner of the servient tenement ... that a right was being asserted ...
>
> The law is stated in Gale on Easements, 12th ed. 1950, p. 171, in these terms: "From the very definition of Prescription, an enjoyment, in order to confer a title, must have been uninterrupted both as to the manner and during the time required by law. It is not to be understood by this expression that the enjoyment of an easement must necessarily be unintermittent; although, in a great variety of cases, it would obviously be so; as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way, it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him - an indication that would not be afforded by a mere accidental or occasional exercise."
>
> ... ...
>
> The problem was stated in slightly different terms by Lord Denman C.J. in *Carr v. Foster et al. (1842), 3 Q.B. 581 at 586:* "There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period."
>
> It may be that substantial enjoyment, in the case of a right of way, is something less than the degree of enjoyment spoken of in *Hollins v. Verney (1883), 11 Q.B.D. 715.* [It was on this case, according to Judson, J., that the statement in Gale on Easements quoted by him was founded.] Even if this is so, my opinion is that the plaintiff has failed to prove any enjoyment or user of substantial character during the period from 1930 to 1935. If

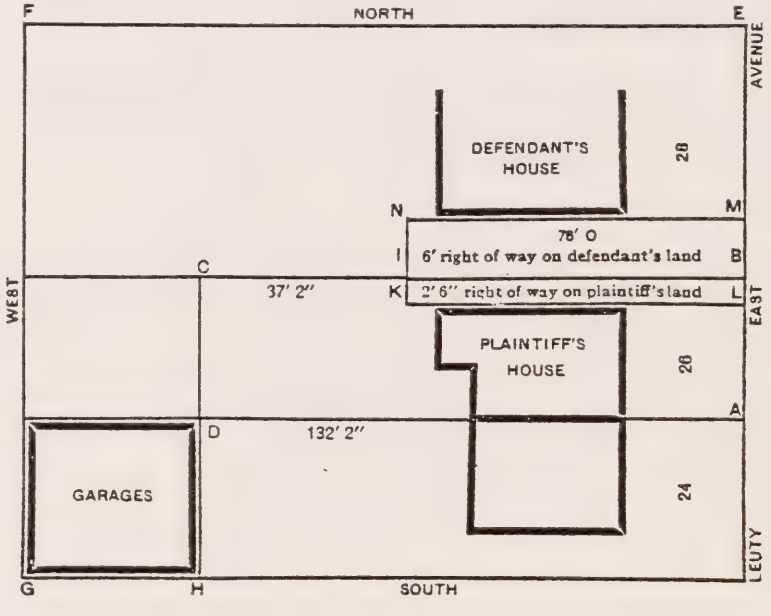
there had been no evidence given for the defence, I could have drawn an inference of user for the period 1930 to 1935 from the very active nature of the user during the prior and subsequent period. But the evidence of non-user during the period 1932 to 1935 is very clear ... The action is dismissed ....

Miller v. Tipling (1918), 43 O.L.R. 88. This was an appeal by the defendant from the judgment of Meredith, C.J.C.P., ... in favour of the plaintiffs, ... restraining the defendant from making use of the northerly 2½ feet to a depth of 76 feet of the plaintiffs' land fronting upon ..., except in connection with the ownership or occupancy of the adjacent premises to the north.

The facts were stated by Mulock, C.J.Ex., as follows:

One Atkinson owned a block of land situate on the west side of Leuty avenue, and erected thereon three houses known as street numbers 24, 26, and 28 respectively, number 24 being the southerly one, then came No. 26 and lastly No. 28. Houses Nos. 26 and 28 were separated from each other by a strip of land, not built upon, having a width of 8 feet 6 inches and extending westerly from Leuty avenue. The two houses were immediately opposite each other and of the same depth from east to west.

On the 11th September, 1912, Atkinson sold and conveyed to the plaintiff's predecessors in title the land upon which house No. 26 is situate, being the lands included within the letters A, B, C, D, and A, on the following plan:-



House No. 26, now the plaintiffs', stood 2 feet 6 inches south of the northerly limit of the plaintiffs' land. At the time of this sale and conveyance, Atkinson owned the land adjacent thereto on the north, on which stood house No. 28, and he also owned the land adjacent thereto on the west, the two portions together forming an L-shaped piece of land, being the land included within the letters B, E, F, G, H, C, and B on the plan. After the description of the land contained in the conveyance from Atkinson to the plaintiffs' predecessors in title are these words: "Together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to

a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

This 6-foot right of way is over the defendant's land shewn in the plan as included within the letters B, I, N, M, and B, and the 2-foot 6 inch right of way, being that in question in this action, is over the plaintiffs' land embraced within the letters B, I, K, L, and B. Shortly after the sale of premises No. 26, Atkinson sold the premises No. 24 to a third party; and later, by deed dated the 23rd September, 1915, conveyed to the defendant his remaining two parcels of land, being together the L-shaped parcel above mentioned, and the defendant has erected at the south-westerly end thereof, at the place indicated on the plan, three garages, which he lets to persons for storage therein of automobiles, and he claims for his tenants the right of way over the plaintiffs' strip of 2 feet 6 inches for a distance of 76 feet westerly from Leuty avenue, basing such claim on the above-quoted words contained in the conveyance from Atkinson to the plaintiffs' predecessors in title, which he says created a right of way over the 2 feet 6 inches strip, appurtenant to the premises where the garages now are.

The grantees did not execute the conveyance containing these words.

It appears that Atkinson maintained a building used as a tool-house in the location later occupied by the three garages.

Riddell, J., said, beginning at page 96,

Automobiles have used this right of way with considerable frequency, to the annoyance of the plaintiffs; this action was brought for an injunction and damages. At the trial judgment was given for the plaintiffs, and the defendant now appeals.

Some troublesome questions as to parties etc. are avoided by the plaintiffs abandoning the nominal damages given and the injunction awarded, and confining their claim to a declaration of rights - the sole question, then, is the interpretation of the clause set out above [as in the statement of facts by Mulock, C.J.Ex. set out above].

In this Province we are governed in real estate matters by the law of England - except as it may have been modified by statute - the law of England having been introduced by the first chapter of the first statute of the first Parliament of the new Province in 1792. While in practice the law is as it is shewn by the existing decisions, the theory is that the Courts may be mistaken, and the law which all the time existed is shewn by the later decisions, not that the law has been altered by late decisions.

We must therefore find not what the authorities in and before 1792 said the law was, but what the latest authorities shew it to have been. It has been said that the law of land in countries under the Common Law of England is a "rubbish-heap which has been accumulating for hundreds of years, and ... is ... based upon feudal doctrines which no one (except professors in law schools) understands" - and rather with the implication that even the professors do not thoroughly understand them or all understand them the same way.

However that may be, it seems that, while a grant of a right of way can be given to a person "in gross," such a grant is a mere personal contract, and gives no estate or interest in the land itself - the tenement is not servient.

If then the reservation or exception could be considered personal to Atkinson, it would give no right to any control of the land, and Atkinson could not convey the right he had.

The plaintiffs must claim by way of easement or not at all.

It is now definitely settled that there is no such thing as an easement in gross in the proper sense of the words: Halsbury's Laws of England, vol. 11, pp. 235, 236, para. 471, citing *Rangeley v. Midland R.W. Co. (1868), L.R. 3 Ch. 306, per* Lord Cairns, L.J., at p. 311; *Hawkins v. Rutter, [1892] 1 Q.B. 668, per* Lord Coleridge, C.J., at p. 671; *Ackroyd v. Smith, 10 C.B. 164, per* Cresswell, J., at p. 188; notwithstanding such cases as *Great Western R.W. Co. v. Swindon and Cheltenham Extension R.W. Co. (1882), 22 Ch. D. 677, 706, 607 (C.A.); Bailey v. Stephens (1862), 12 C.B.N.S. 91, per* Willes, J., at p. 111 - to these I add *David Allen & Sons Billposting Limited v. King, [1915] 2 I.R. 448* (affirmed in Dom. Proc. *sub nom. King v. David Allen & Sons Billposting Limited, [1916] 2 A.C. 54),* where an interesting and valuable discussion by Ronan, L.J., will be found, pp. 463 *sqq.*

The grantee of an easement must, at the time of the creation of the easement have an estate in the tenement to which the easement is to be appurtenant: *Rhymer v. McIlroy, [1897] 1 Ch. 528;* Halsbury, vol. 11, p. 246, para. 497. It is also clear that, properly speaking, there can be no easement the subject-matter of an exception; but where the instrument conveying the servient tenement purports to reserve an easement (or as here to except an easement) in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee: *London Corporation v. Riggs (1880), 13 Ch. D. 798; Dynevor v. Tennant (1886), 33 Ch. D. 422* (affirmed in Dom. Proc. *(1888), 13 App. Cas. 279);* Halsbury, vol. 11, p. 249, para. 501. The difference between a reservation and an exception, which is fully explained by Lord Watson in *Cooper v. Stuart (1889), 14 App. Cas. 286, at p. 289,* and by Swinfen Eady, J., in *South Eastern R.W. Co. v. Associated Portland Cement Manufacturers (1900) Limited, [1910] 1 Ch. 12, at p. 22,* is here immaterial. See also articles in 27 Law Quarterly Review 150 and in 32 Law Quarterly Review 70.

We must then read this "exception" as though there had been a deed in fee to the plaintiffs and a grant by the plaintiffs in the words of the exception in a deed having the plaintiffs as grantors and Atkinson as grantee. As an easement is never in gross, it must be appurtenant to some particular piece of land (or, as it is sometimes put, appurtenant to the ownership of a particular piece of land), and of course passes with the land without express mention: Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15 (now R.S.O. 1970, ch. 85, sec. 15); Short Forms of Conveyances Act, R.S.O. 1914, ch. 115, sched. B. 2, 3 (now R.S.O. 1970, ch. 435, sched. B. 2, 3) (this was so even at the common law: Co. Litt. 121 b; Shep. Touch, 89) - the defendant then has all the rights which Atkinson had at the time of the deed in question, the 11th September, 1912 - I am unable to read the exception as a double grant (1) to the grantor in the deed, and (2) to the owners or occupants of the adjacent premises to the north, i.e., as a grant to Atkinson of a right of way appurtenant to some

other or some additional land and to the owners or occupants of this particular piece of land.

It seems to me that the dominant tenement described, i.e., "the adjacent premises to the north," is the dominant tenement to which this right of way is appurtenant, and that the right of way is appurtenant to the ownership (using the word in a large sense) of that land. There is a particular piece of land which is accurately described as "adjacent premises to the north" of the land conveyed by the deed to the plaintiffs - no doubt, "'adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage:" *Mayor of Wellington v. Mayor of Lower Hutt, [1904] A.C. 773, at p. 775;* but the word connotes, both etymologically and in ordinary use, a "lying beside." Lot 28 lies beside lot 26 to the north, and it is literally the "adjacent premises to the north" of it.

One cannon of interpretation of deeds and other contracts is that, if an object can be found exactly fulfilling the description, the words being used in their ordinary signification, that is taken as the object meant by the contract, unless there is something in the contract or the circumstances indicating some other object - here I find nothing in the circumstances or the contract of such a kind.

We have three houses built by the same person on land owned by him, two sold and one retained - to the two houses sold a certain depth of land is attached by Atkinson. Why should any one think that he intended to act differently by the third retained by him? Moreover, in the very deed in question there is attached to lot 26 a similar easement over lot 28 - wider indeed but the same length. Why should the owner of lot 26 imagine he was giving to the owner of lot 28 a greater right than he was receiving?

It seems to me that the right of way "excepted" was so excepted for the advantage of lot 28, and that only - and that no one not in privity with the owner (using the word in the large sense) of lot 28 can use the way - and it can be used only in connection with the use or enjoyment of lot 28.

The use of the garage to the rear of lot 24 is entirely unconnected with the use or enjoyment of lot 28 - *Ackroyd v. Smith, 10 C.B. 164* - and the use of the way for the purposes of the use of the garage is wholly unjustified by the deed.

The short user of the tool-house by Atkinson is not sufficient to give any rignt of way by prescription.

I am not to be considered as holding that the right of way in question cannot be used at all in connection with the back premises; there may be a use of this land which is merely for the beneficial enjoyment of lot 28 (probably the use of the tool-house was such). I do not decide anything in respect of premises so used: the only matter which is under consideration and which this judgment covers is the use for a garage which has no relation with the beneficial enjoyment of lot 28.

Mulock, C.J.Ex., in his judgment, had this to say at pages 91 to 95,

In *Durham and Sunderland R.W. Co. v. Walker (1842), 2 Q.B. 940, 967,* Tindal, C.J., says:-

"It is to be observed that a right of way cannot, in strict-

ness, be made the subject of an exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee."

The grantee of the land in question not having executed the deed, I fail to see how the insertion of the quoted words in that deed created what is described sometimes as a re-grant and sometimes as a covenant. It may be that the grantee might be compelled to carry out the intention of the parties by executing an instrument sufficient to create an express grant. The plaintiffs not pressing the point, I will assume that the instrument created a re-grant of a right of way; and the question is, to what land was such right of way made appurtenant? The defendant contends that the words created a right of way appurtenant not only to the land adjacent to the north to the 76-foot strip, but also to the other lands then owned by Atkinson, namely, that parcel lying westerly and south-westerly of the plaintiffs' land, on the southerly portion of which are the garages in question.

The only dominant tenement referred to in (I shall call it) "the re-grant" is "the adjacent premises to the north" etc.

The defendant's claim must fail unless the re-grant created a right of way appurtenant to the lands lying westerly and southerly of the plaintiffs' land, and which I shall hereafter refer to as the westerly premises. Does it? It is of the very essence of a right of way appurtenant that it be appurtenant to some particular parcel of land. It exists solely for the benefit of that land and has no separate existence. Unless appurtenant to a definite piece of land, there is no easement.

As a matter of correct conveyancing, the dominant tenement should be named in the grant of an easement appurtenant, and its omission in the present case is significant.

... ...

The re-grant here makes no reference to the westerly premises, and the conclusion must be that it was not intended to create a right of way appurtenant thereto - a view which, if correct, is fatal to the defendant's contention. That the parties did not contemplate a re-grant applying to the westerly premises is suggested by many circumstances.

... If it had been intended to create a right of way appurtenant to the westerly premises over the plaintiffs' land, the obvious course would have been not to stop the right of way at the 76 feet point, but at the westerly limit of the plaintiffs' land. Stopping where it did, at a point a few feet west of the west side of both houses, suggests that it was made to run past the houses just far enough to enable vehicles to turn around, thus indicating that it was created for the benefit of premises Nos. 26 and 28 only.

... Atkinson owned the 6-foot strip of the land beyond the 76-foot point, and it furnished to him means of ingress and egress in respect of his westerly premises.

... the re-grant defining only "the premises adjacent to the north," etc., goes to shew that the parties had those lands in their minds as the only ones to which the right of way should be appurtenant. *Expressum facit cessare tacitum* (what is expressed

makes what is implied to cease).

These circumstances, I think, indicate that the parties did not contemplate a right of way over the two feet six inches strip as appurtenant to the westerly premises, but it remains necessary to deal with the contention of the defendant that, according to the strict reading of the re-grant, he is entitled to such right. The argument is that the words "subject to a right of way for the party of the first part" are to be read apart from those that follow. Even if that were so, those words apply to Atkinson only, and this defendant takes nothing under them. But we are asked to make them include the defendant, and to that end to make a new contract for the parties to the re-grant, by reading into it terms creating a right of way appurtenant to the westerly lands. Such is not the privilege of the Court.

I am, however, unable to accept the defendant's construction of the meaning of the re-grant, and am of opinion that it must be read as a whole, and that the words which follow, namely, "and the owners or occupants of the adjacent premises to the north," qualify all the preceding words, and that its legal effect is to limit the right of way to Atkinson and other owners or occupants of the adjacent premises to the north.

If the words in the reservation of the right of way had omitted the words "to the north," leaving it to read "subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises," Atkinson (who was at the time the owner thereof) would have been included in the word "owners," and the easement would have become appurtenant to all of his adjacent premises, namely, those to the west as well as those to the north; and, if such had been the intention of the parties, it would have been accomplished by the omission of the words "to the north." Then why were those words added? Clearly, I think, to limit the right of way to the premises to the north. No other reason, I think, can be assigned.

... ...

A further argument is, that the defendant, having the right to use the way in question in respect of his adjacent premises to the north, is entitled to pass over those premises to and from his westerly premises, and for such purpose to use the 2-foot 6-inch way. That way, being appurtenant only to the defendant's adjacent premises to the north, can be used for the benefit of those premises only. Such is the measure of the defendant's rights, and user in excess of those rights is trespass.

The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. This does not mean that where the way has been used in accordance with the terms of grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant; but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way: *Skull v. Glenister, 16 C.B.N.S. 81; Finch v. Great Western R.W. Co., 5 Ex. D. 254; Telfer v. Jacobs, 16 O.R. 35; Jarris v. Flower & Sons Limited, [1904] W.N. 106, 180; Purdom v. Robinson, 30 S.C.R. 64, 71; Ackroyd v. Smith (1850), 10 C.B. 164.*

In the present case the defendant claims the right to use

the way in question for the benefit of his westerly premises, or to use it as a way to the adjacent premises to the north, for the purpose of thereby reaching his westerly premises. I am of the opinion that he is not entitled to either of such users, and that the learned trial Judge rightly decided the case, and that this appeal should be dismissed with costs.

Clute, J., wrote a dissenting judgment, but Kelly, J., agreed with Mulock, C.J.Ex.

The next case, *Garfinkel v. Kleinberg and Kleinberg, [1955] O.R. 388 (C.A.)*, is about the plaintiff's claim to a prescriptive right to use the defendants' chimney. However, what was said in that case by the Court is also applicable to a claim to a prescriptive right of way.

The following is from the judgment of the Court delivered by MacKay, J.A., beginning at page 392,

> ... The plaintiff's claim to an easement is based on user for more than 20 years and comes within the provisions of the first part of s. 34 of The Limitations Act, R.S.O. 1950, c. 207, the relevant part of which is as follows:
>
> "No claim which may lawfully be made at the common law by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of 20 years, but, nevertheless the claim may be defeated in any other way by which the same is now liable to be defeated..." [See now, R.S.O. 1970, ch. 246, s. 31.]
>
> The wording of this section is the same as that of s. 2 of the English Act (The Prescription Act, 1832, 2-3 Wm. IV., c. 71), and the cases decided under that Act are relevant in considering the Ontario Act.
>
> A distinction between the cases where an easement is claimed at common law and where it is claimed under The Prescription Act is stated in Gale on Easements, 11th ed. 1932, p. 243, as follows:
>
> "Before the Prescription Act, any admission, whether verbal or otherwise, that the enjoyment had been had by permission of the owner of the servient tenement was sufficient to prevent the acquisition of the right, however long such enjoyment might have continued.
>
> "Since the Prescription Act, where an easement is claimed under the Act, the effect of permission for the enjoyment having been given by the owner of the servient tenement has been considered in many cases.
>
> "An easement other than light may be claimed under s. 2 of the Act on the ground of an enjoyment for twenty years; and in that case it has been laid down that a parol permission, if it extends over the whole period of twenty years, is consistent with, and will not *per se* prevent the enjoyment from being, an enjoyment as of right. On the other hand, if the parol permission be given from time to time within the twenty years, this would prevent the enjoyment from being an enjoyment as of right."

The words "claiming right thereto" used in The Prescription Act have been held to have the same meaning as "user as of right": *Tickle v. Brown (1836), 4 Ad. & El. 369, 111 E.R. 826; Gardner v. Hodgson's Kingston Brewery, Limited, [1900] 1 Ch. 592*, reversed *[1901] 2 Ch. 198*, which was reversed *[1903] A.C. 229*. "User as of right" is defined in 11 Halsbury, 2nd ed. 1933, pp. 296-7, para. 537, as follows:

> "The user or enjoyment of an alleged right in order to support a prescriptive claim, under the doctrine of prescription at common law, must be shown to have been user 'as of right', having been enjoyed *nec vi, nec clam, nec precario*, neither as the result of force, secrecy, or evasion, nor as dependent upon the consent of the owner of the servient tenement. Consent or acquiescence on the part of the servient owner lies at the root of prescription. He cannot be said to acquiesce in an act enforced by mere violence, or in an act which fear on his part hinders him from preventing, or in an act of which he has no knowledge actual or constructive, or which he contests and endeavours to interrupt, or which he sanctions only for temporary purposes, or in return for recurrent consideration.
>
> "Actual ignorance of the exercise or enjoyment of the alleged right will not in every case prevent the enjoyment from being as of right. There are some things which every man ought to be presumed to know. Very slight circumstances may put the servient owner upon inquiry, and if he neglects to make inquiry it may be that knowledge must be imputed to him. Where an ordinary owner of land, diligent in the protection of his interests, would have a reasonable opportunity of becoming aware of the enjoyment by another person of a right over his land, he cannot allege that it was secret. If, however, the enjoyment be fraudulent or surreptitious, it cannot support a prescriptive claim."
>
> A reading of the cases referred to in the footnotes to this section makes it clear that the statements that "consent or acquiescence on the part of the servient owner lies at the root of prescription" and that "the user must not be dependent on the consent of the owner of the servient tenement" are not inconsistent. Where the right is claimed under The Limitations Act, consent to the user, unqualified as to time, will not be a bar to the owner of the dominant tenement obtaining a prescriptive right; if the user following the consent or permission is as of right by reason of the consent, and if the user continues for the full period of 20 years after the consent a prescriptive right is acquired under the statute; but permission asked and granted, periodic payments, or acknowledgment by the dominant owner that his user is not as of right, at any time during the 20-year period will prevent his acquiring a prescriptive right: *Kinloch et al. v. Nevile (1840), 6 M. & W. 795, 151 E.R. 633; Tickle v. Brown, supra; Gardner v. Hodgson's Kingston Brewery, Limited, supra; Myers v. Johnston, 52 O.L.R. 658, [1923] 4 D.L.R. 1152; Bowes v. Reid, 54 O.L.R. 253, [1924] 2 D.L.R. 399.*

In *Pickard v. Kernick (1928), 63 O.L.R. 225 (App. Div.)*, the plaintiff claimed a prescriptive right of way over the defendant's land.

The following statement of facts is taken from the judgment of Latchford, C.J., who wrote a dissenting judgement,

> The plaintiff is one of the sons, and the sole surviving executor, of one Richard Pickard, who, in 1881, purchased from one George Samwell, then his partner in business, lots 1 to 5 inclusive and the

westerly 12½ feet of lot 12 on the north side of John-street in the village of Exeter, as shewn by ... Taylor's survey.

Richard Pickard died in December, 1897. He devised his dwelling house and premises, with the land occupied therewith, together with other property, to his wife for life, after which what was so devised, with other property, was to pass to his executors.

The plaintiff pleaded that, at the time his father made the purchase from Samwell, it was agreed between the partners that his father should have a right of way or lane in common with Samwell over parts of lots 6 and 7, Taylor's survey, from the front of John-street to the rear of lots, of a width of 49 feet.

The deed to Pickard contains no reference to a right of way, and the plaintiff does not seek a reformation of the conveyance, but contends that, by reason of the length of time the lane has been used by himself, his mother and his father, a prescriptive right to its user has become established. He states that from 1881 until 1927, or for a period of about 46 years, he and his predecessors in title have had the open, continuos, and uninterrupted use of the lane. Not until 1927 was any attempt made by the defendant to interfere with such use. In the spring of that year, the defendant obstructed the access which the plaintiff and his mother and father had enjoyed from John-street through the lane to their barn on the south end of it. The obstruction then placed on the right of way materially interfered with the plaintiff's use of his barn or stable and other buildings in the rear of the Pickard property.

The defendant denied that the plaintiff had the right which he claimed, and pleaded that there was never any such user of the land as gave the plaintiff a prescriptive right thereto. He further alleged that he purchased from the surviving executor of Samwell without notice or knowledge of the claim which the plaintiff asserted, and that the acts complained of were in the ordinary use of his own property, over which the plaintiff had no legal right whatsoever.

The defendant's purchase was made in December, 1917. It included all of lot 6 except the 12½ links conveyed to Richard Pickard, and also lot 7.

The evidence discloses that for nearly nine years afterward, or until June, 1927, he did not interfere with the use made of the lane by the plaintiff's mother, the plaintiff himself, and his tenants.

... ...

The defendant had examined the property before the sale and knew of the existence of the lane ... He reluctantly admitted having gone through the lane to and from the stable at the rear, in 1902 and 1903, when he purchased a horse from Richard Pickard.

In any case a registered title cannot prevail against a right founded on prescription: *Israel v. Leith (1890), 20 O.R. 361; Myers v. Johnston (1922), 52 O.L.R. 658, 664.*

The trial Judge decided "that the plaintiff is entitled to a right of way for all necessary purposes in, over, and upon the fenced driveway, being that part of lots 6 and 7 on the north

side of John-street, Taylor's survey ..." and Latchford, C.J., who would have dismissed the appeal, said at page 231,

> Samwell, as owner of the fee, had unquestionably the right to set apart the lane over his lands for the use in common of himself and his partner. He acquiesced in such use, as did his widow, and also the defendant himself for nearly 9 years after his purchase. Till then, or for a period of more than 40 years next before action, there was the open and continuous use of the lane by the owners of the dominant tenement and their tenants, and equally uninterrupted acquiescence in such case by the Gladmans and Kernick, the owners of the servient tenement. Further it appeared ... that Richard Pickard had joined with his partner in fencing the lane and planting it with trees, and that he, his widow, and the plaintiff had supplied materials to make and improve the roadway. ...
>
> The Limitations Act, R.S.O. 1927, ch. 106, sec. 34, provides that where a way has been enjoyed for the full period of 40 years, the right thereto shall be deemed to be absolute and indefeasible, unless it appears that the same was enjoyed by some written consent or agreement expressly made for that purpose by deed or writing. No such consent or agreement exists.
>
> Mr. Smyth (for the appellant) argued that the period comprised in the lifetime of the widow of Richard Pickard should not be considered as part of the statutory 40 years. No authority, however, was cited in support of that argument, and on principle it appears to me fallacious. Mrs. Pickard was the owner for life of the dominant tenement - an estate of freehold - and the plaintiff as executor of his father had the fee in such tenement from his mother's death until action was brought. There was in the Pickards absolute continuity of title as well as of possession and continuous use of the servient tenement by them as successive owners.
>
> The law as to tenancy for life is, I think, accurately stated in Gale, 10th ed., p. 225, where it is said that "the enjoyment of an easement by a tenant for life in possession will enure for the benefit of the fee simple and be a sufficient foundation for presuming an absolute grant accordingly." See *Codling v. Johnson (1829), 9 B. & C. 933.*
>
> Even were the origin of the use of the lane by the plaintiff and his predecessors in title more doubtful, effect should ... be given to their continuous use of the lane. The only objection ever made by the Gladmans to its use was that the Pickards should not bring their cows upon it to be milked. It should be mentioned that the Pickard family had a field of 6 acres to the north of the lane, and to this their only access was by means of the lane.
>
> In *Halliday v. Philipps (1889), 23 Q.B.D. 48,* and *Philipps v. Halliday, [1891] A.C. 228,* the question was as to the right of Mr. Halliday to the possession of a pew in a parish church. In the Court of Appel Lord Justice Fry said:-
>
> "The Courts are under an obligation which has been insisted on over and over again, whenever they can, to clothe with legal right long continued and undisputed enjoyment; and in my judgment that obligation rests upon the Court although enjoyment may be shewn to have had *de facto* an invalid or illegal or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmi-

ty in the *de facto* commencement, the Court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time."

This view of the law was affirmed in the House of Lords. Lord Herschell said ([1891] A.C. at p. 231):-

"Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title."

The same principle plainly applies to such an easement as the plaintiff claims. See observations of my brother Masten in *Abel v. Village of Woodbridge (1917), 39 O.L.R. 382, 389.*

Mr. Smyth (for the appellant) urged that at the utmost all the plaintiff was entitled to was the use of the *via trita* in the centre of the lane.

I cannot bring myself to agree with this contention.

One result of so holding is that the defendant would be entitled to enter upon the west side of the travelled way and girdle or cut down the trees planted there by Richard Pickard, and for more than 40 years affording shade and protection from the east wind to the Pickard property. So far as I know, no case decides that such shade and protection constitute an easement, and it is not difficult to imagine cases in which it would be improper so to decide.

Here, however, the circumstances are exceptional. They point to an agreement by Gladman with his partner or to what has been ripened by time into a grant, that the whole lane and not merely the *via trita* should be for their common use. How otherwise account for the fact that the trees were planted and paid for on the one side by Gladman and the other by Pickard? Thus the lane, like the approaches to the two houses, was made to present an appearance of symmetry, and, as the trees grew, no doubt of beauty - a symmetry and beauty which would utterly disappear if the only right of the plaintiff in the lane was held to be along the *via trita* - and the defendant destroyed, as he would have the right to do, the trees planted, in the circumstances stated, along the sides of the travelled way.

In *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd., [1915] A.C. 599,* it was contended that the easement claimed was unknown to the law. Delivering the judgment of their Lordships, Lord Shaw of Dunfermline said (p. 617):-

"The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is sought inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce v. Hay (1852), 1 Macq. H.L. 305,* by Lord St. Leonards, L.C., who observed: 'The category of servitude and easements must alter and expand with the changes that take place in the circumstances of mankind'."

It was, in my opinion, the manifest intention of Gladman to grant to his partner not merely a right of way through the lane, but also whatever other advantages might be derived from it by both parties.

Mr. Smyth (for the appellant) also urged that, as the plaintiff

and his tenant traversed the lane with automobiles, there was an improper, because enlarged, use of any right originally intended.

It is quite true that, in the case of an express grant, the owners of the dominant tenements cannot substantially increase the burden of the easement by enlarging its character, nature, or extent as enjoyed at or previous to the date of the agreement: *Great Western Railway Co. v. Talbot, [1902] 2 Ch. 759.* There was, however, no restriction imposed by Gladman on the ordinary and reasonable use of the lane by his partner, and its use by motor-cars in 1927 was as ordinary and reasonable as its use by horse-drawn vehicles in earlier years. I would apply here the observations above quoted from Lord Shaw of Dunfermline. It may be noted that in *Attorney-General v. Hodgson, [1922] 2 Ch. 429,* Peterson, J., observed (p. 438) that a motor-car was within the scope of a grant made in 1861 of a "right of carriage horse and footway."

Masten, J.A., said, at page 233,

... I have had the opportunity of perusing and considering the judgment prepared by my Lord the Chief Justice, and I agree with his statement of facts and his conclusions of law except as to the extent of the right of way claimed in the present case.

There can be no question but that the defendant had such notice of the plaintiff's right as to preclude him from claiming the benefit of the Registry Act, even if he had pleaded it, which he has not done (see the decision of this Court in *Smith v. Thornton (1922), 52 O.L.R. 492).*

With respect to the extent or limits of the way claimed by the plaintiff, I am of opinion both upon the facts and the law, that the action has been launched, the evidence directed, and the argument on this appeal confined to a claim by prescription under the Limitations Act, R.S.O. 1927, ch. 106, sec. 34. On that claim the trial Judge at the close of the evidence found that a right of way had been acquired by prescription, that in the case of a way by prescription the evidence of user is the only evidence of the right, that the extent of the user is the measure of the extent of the right, and that each party used only that portion required for entrance to and exit from his lands. In his subsequent findings of the 29th March, 1928, he omitted the last finding, but I do not understand that he ever resiled from it.

Orde, J.A., said, at p. 235,

I have carefully considered the judgments of my Lord the Chief Justice and my brother Masten.

There can be little doubt from the evidence that when the predecessors in title of the present parties laid out and fenced in the so-called lane between the parcels of land upon which their respective dwellings stood, there was some mutual understanding or arrangement as to the user by the plaintiff's predecessor of the 49-foot strip in question, the fee simple of which remained vested in the defendant's predecessor, and it is not improbable that Samwell, the owner of the fee, intended that Pickard should not only use the actual roadway for ingress and egress to and from the rear of his adjoining land, but might also roam over the remaining portions of the 49-foot strip, thereby making such portions a sort of "no man's land" for the benefit of both.

But the plaintiff's case here rests upon prescription solely, and not upon any agreement, arrangement, or understanding made

when the lane was laid out. To give to any such arrangement the full force demanded by the plaintiff would violate every rule against the establishment of such agreements by parol evidence.

I feel myself constrained, therefore, to concur in the judgment of my brother Masten that the prescriptive right of the plaintiff to a right of way, as an easement, over the lane, must be confined to so much thereof as he continuously used during the period in question; and the evidence is quite clear that the part used was the *via trita* from the street to the point where he and his predecessor in title entered his own back-yard and no more. The width of the part so used ought, of course, to be reasonable, ...

RIGHTS OF WAY CREATED BY GRANT

Re Ottawa Electric Railway Co. and Federal District Commission (1930), 66 O.L.R. 154. An appeal by the railway company and the Commission from a decision of the Local Master of Titles at Ottawa ....

The appeal was heard by Orde, J.A., who said in part as follows,

The difficulty arises upon the request of the parties to register an easement in gross under sec. 93 of the Act [See now, R.S.O. 1970, ch. 234, s. 43.]. The railway company is the registered owner in fee simple of lot 26, plan M.61, in the register of Land Titles at Ottawa. The lands consist of a narrow strip, and upon it are the rails, ties, poles, and wires of the railway company, the strip being a small part of the land over which the company carries and operates its line of railway.

The company now desires to transfer the lands to the Federal District Commission, but to retain its ownership of its rails, poles, etc., and its right to maintain and operate the railway over the land, and in order to carry this out a transfer in the following words has been tendered to the Local Master of Titles for registration and the issue of the proper certificates of ownership in consequence thereof:-

"Land Titles Act."

"The Ottawa Electric Railway Company, of the City of Ottawa, in the county of Carleton, the registered owner of the lands registered in the office of Land Titles at Ottawa as parcel 1290 in the register for Carleton, in consideration of the sum of $1 paid to it, transfers to the Federal District Commission, of the City of Ottawa, the land hereinafter particularly described, namely:-

"Lot No. 26 as shewn on plan M.61, filed in the said Land Titles office, being the whole of the said parcel.

"Reserving thereout and therefrom unto the said the Ottawa Electric Railway Company, and persons deriving title under it, the sole and exclusive permission, right, and privilege, at any time or times, of constructing, completing, operating, and maintaining, over, on, and upon the said land, or any part thereof, and either upon rails or otherwise, *(a)* a single or double track line of railway with the necessary side-tracks, switches, turn-outs, poles, wires, conduits, works, and appliances, and *(b)* its transportation system as defined in its special Acts, and any vehicles of such system, and excepting thereout and therefrom the ownership of and property in the track of railway, and all poles, wires, works, and appliances used or formerly used in connection therewith, now on the said land, the latter not to be removed therefrom without the

written consent of the Ottawa Electric Railway Company; it being understood and agreed that the Federal District Commission shall have the right to construct, maintain, use and permit to be used, a crossing or crossings for passengers on foot, or with horses, carriages or other vehicles, at any point or points over the said land, or track of railway, if any; provided however that any crossing or crossings so constructed shall be constructed and maintained at the sole cost of the Federal District Commission, and without expense, damage or injury to the Ottawa Electric Railway Company, and that at such crossing or crossings the vehicles of the Ottawa Electric Railway Company shall have precedence over the servants or agents of and all persons authorized by the Federal District Commission crossing the said land, or track of railway, if any, and the Ottawa Electric Railway Company may, by notice in writing, require the Federal District Commission to compel its servants or agents and all persons authorized by it using the said crossing or crossings to come to a full stop before proceeding to cross the said land, or track of railway, if any.

"Dated at Ottawa the 11th day of June, 1930."

The Local Master has refused to register the transfer and to issue the two certificates upon the ground that, as drawn, the instrument purports to create an easement, not only upon the lands which become the property of the Commission, but also upon that portion of the realty, namely, the existing rails, ties and other fixtures, which are retained by the railway company as an exception from the lands comprising lot 26 as now registered. This would mean, in his view, that an easement is created over a part of the realty which still remains vested in the railway company; and, as he says, it is impossible to possess an easement over one's own land.

If the Court were called upon to determine what the parties intend by the instrument there would be no difficulty, but I think that the Local Master, who has a due regard for the niceties of conveyancing, is technically right, and that he ought not to be called upon to interpret the provisions of the transfer by sorting out and reconstructing in his own language the parcel actually intended to be granted to the Commission and the easement intended to be created thereon in favour of the railway company.

The Local Master has suggested that the stipulation as to the ownership of the rails, etc., should be incorporated in a separate instrument and kept off the register. This might serve the purpose, but I know of no reason why the parties, if they wish it, should not have all their respective rights and interests in the whole parcel of land spread upon the register for their mutual protection, provided they embody the transaction in an instrument in proper form.

The real difficulty here arises from the failure to define the exact parcel intended to be vested in the Commission first before proceeding to describe the easement which it is intended to give to the railway company. The exception from the grant appears in the middle of the reservation of the easement, and it is this that has rendered the task of the Local Master difficult.

In preparing an instrument of this nature, it is important to keep in mind what is meant by an exception from the grant and by the so-called reservation of an easement over the parcel granted. The words "excepting" and "reserving" are often misused in conveyancing; and, while a Court will usually give due effect to the

intention of the parties notwithstanding the misuse of the words, their use often indicates some confusion in the mind of the draftsman as to what he intends to effect by the instrument.

"An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, which is necessary to enable it to be excepted, nor does it issue out of the land, as it should, to render it capable of being the subject of a reservation. It is, however, a very common thing to speak of an easement being reserved, or of the reservation of an easement. If an easement be incorrectly described in a deed as being reserved to a grantor of land, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly-created easement by the grantee of the land to the grantor." Goddard on Easements, 8th ed., p. 147. See also Armour on Titles, 4th ed. p. 257. [See *Miller v. Tipling, supra, p.* 68, and *Adamson v. Bell Telephone Co. of Canada* and *Bell Telephone Co. of Canada v. Adamson, infra.*]

I think that the transfer should be redrafted in the following manner. Immediately after the description of lot 26, as it now appears in the transfer in question, should follow the exception of the existing rails, ties, poles, wires, works, and other fixtures which the parties intend shall remain vested in the railway company. This clearly defines the exact extent of the parcel of realty transferred to the Commission. Then should follow the "reservation" of the easement over the lands so transferred. The easement should comprise not only the right to continue to use and operate its tramcars and other vehicles over the existing and all future lines of rails upon the parcel transferred, but also the right at all times to erect and place upon the parcel other rails, etc., in substitution for those now there, and to enter into and upon the parcel for that purpose and for the purpose of making all necessary repairs and of removing the same and for purpose of inspection, etc., and should also provide that all additional or substituted rails, etc., shall be and remain the property of the railway company.

In *Adamson v. Bell Telephone Co. of Canada* and *Bell Telephone Co. of Canada v. Adamson (1920), 48 O.L.R. 24,* the cases were consolidated, the question for decision being the right of way of the respondent, the Bell Telephone Co. of Canada, over a strip of land 10 feet wide and 37 feet in length, being the southerly 10 feet of the westerly 37 feet of the North half of lot No. 16 on the east side of John street ... according to registered plan No. 115. The judgment of the County Court declared that the respondent was entitled to the right of way which it claimed.

The dominant tenement owned by the respondent and the servient tenement owned by the appellants consist of parts of a block of land bounded on the west by John street, on the north by Elizabeth street, on the east by Bayfield street, and on the south by the lands of G. Lount, Esq. This block comprises lots Nos. 16 and 17 on the east side of John street and lots Nos. 10 and 11 on the west side of Bayfield street. These lands were formerly owned by Elizabeth Ross and were further subdivided by her.

The first two conveyances made by Elizabeth Ross were made on the 20th October, 1887. The parcels conveyed consisted of parts of lots Nos. 10 and 11 fronting on Elizabeth street. Both parcels, as the conveyances state, extended "to the north side of a right of way running across said lot 11," with a right of way over what

is described as "a certain right of way 10 feet wide also with free ingress ... into along and upon and out of a certain right of way over and upon the southerly 10 feet of the north half of lot 11 on the west side of Bayfield street and the southerly 10 feet of the north half of lot 16 on the east side of John street, Edgar's plan". Both conveyances were registered on the 15th December, 1887.

After making those conveyances it was not competent for her to derogate from the grants she had made. But, on the 9th December, 1903, Elizabeth Ross conveyed to Mary Elizabeth Perkins the westerly 37 feet of the north half of lot No. 16 and the westerly 37 feet of lot No. 17. It was doubtless owing to a mistake on the part of the conveyancer who prepared the conveyance that the 10-foot right of way was not made the southerly boundary of the 37 feet conveyed to Mary Elizabeth Perkins. In any event the land thereby conveyed was subject to the right of way appurtenant to the lands described in the first two conveyances made in 1887.

On the 4th October, 1906, Mary Elizabeth Perkins obtained a conveyance of all that part of lot No. 11, having a frontage of 95 feet on Elizabeth street and described as extending southerly 89 feet more or less to the north side of a lane or right of way running across said lots Nos. 11 on the west side of Bayfield street and 16 on the east side of John street aforesaid, and another part of lot No. 11, together with a grant of right of way over the 10-foot strip, expressed in substantially the same terms as the rights of way granted by the conveyances of the 20th October, 1887, are described in them.

On the 1st January, 1908, Mary Elizabeth Perkins conveyed the westerly 37 feet of the north half of lot No. 16 and the westerly 37 feet of lot No. 17 to Alfred B. Wice, "excepting and reserving unto the grantor her heirs and assigns full right and liberty at all times hereafter in common with all other persons who may hereafter have the like right to use the lane 10 feet in width being the south 10 feet of the north half of said lot 16 for all necessary purposes either with or without cattle or other animals, carts, waggons, carriages, and other vehicles."

It was argued for the appellants that the right of way reserved by Mary Elizabeth Perkins in the conveyance to Alfred B. Wice could not become appurtenant to that part of lot No. 11 abutting on the lane owned by Mary Elizabeth Perkins and subseqently conveyed by her to the respondent together with a right of way over the whole lane, because the right of way was an easement in gross, merely a personal license, which died with the person, and was not assignable. Wice did not sign the conveyance.

Meredith, C.J.O., said at page 31,

> ... the effect of the conveyance from Mary Elizabeth Perkins to Alfred B. Wice was to extend the easement to which she was undoubtedly entitled in respect of the other land then owned by her so as to include the southerly 10 feet of the 37 feet which had been conveyed to her by ... (Elizabeth Ross).
>
> There is no case which requires us to hold that Mary Elizabeth Perkins could not by a proper grant acquire, as appurtenant to the parcel owned by her ... (in lot No. 11), a right of way over the southerly 10 feet of the 37 feet, ...
>
> It is doubtless the law that there is no such thing as an ease-

> ment in gross in the proper sense of the word, and that the grantee of an easement must at the time of the creation of it have an estate in the tenement to which the easement is to be appurtenant. That requirement is satisfied ... because, ... Mary Elizabeth Perkins was the owner of the land to which the easement was to be appurtenant.
>
> The law is that, as my brother Riddell said in *Miller v. Tipling*, ... "properly speaking, there can be no easement the subject-matter of an exception;" but, as he points out, "where the instrument purports to reserve an easement ... in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee."
>
> It was contended ... that this law does not apply, because the conveyance to Wice was not executed by him, and therefore there could be no new grant of the easement. That would no doubt be so at law; but it is clear that in equity it would not, and that in equity the grantee would not be permitted to prevent the easement from being enjoyed by his grantor or those claiming under him...

In *Torosian v. Robertson, [1945] O.W.N. 427*, the plaintiff and the defendant owned adjoining properties, which were owned in common until 1909, when the owner, Benjamin Robertson, conveyed part of the land to the plaintiff's predecessor in title. Robertson conveyed the defendant's land to him in 1910, and the plaintiff purchased his property in 1921.

A drain ran from the corner of the plaintiff's house under his lands, under a street, and then under the defendant's lands to a gully, where it emptied. This drain had been in existence and in use since 1895. In 1909 the plaintiff's predecessor in title installed a bath-tub in the house, and since that time the water from the bath-tub and from the wash-basins drained into a sump in the basement, and thence into the drain in question...

The defendant blocked the drain and the plaintiff sued for an injunction to restrain the defendant, his servants, workmen and agents, from obstructing, impeding or interfering with the drain ...

Barlow, J., said, at pp. 427, 428,

> Upon the evidence which I accept I must find that the drain is not now being used for any different purpose than that for which it was used at the time the plaintiff purchased the property in 1921, and for some years before.
>
> I cannot find that the plaintiff has exceeded the right of user which has existed since prior to his purchase of the property.
>
> ... ...
>
> The plaintiff, by virtue of the grant from Benjamin Robertson, the common onwer, to his predecessor in title, obtained an implied grant of easement with respect to the said drain. See *Israel v. Leith (1890), 20 O.R. 361 at 367*, where Street J. said: "... where the owner of two adjoining lots of land conveys one of them he impliedly grants all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety

> for the benefit of the part granted ... and the rights of drainage and of aqueduct are within this category of easements."
>
> See also *Polden v. Bastard (1865), L.R. 1 Q.B. 156,* where Erle C.J. says: "... it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant".

Golisky et al. v. Romanuik et al. , [1951] O.W.N. 401. The owners of a large undivided parcel of farm lands conveyed to purchasers the south-easterly 40 acres thereof, referred to as Parcel 4. The first deed of Parcel 4 contains a grant of a right of way in the following words: "Together with a right of way over along and upon a strip of land fifteen feet in width immediately adjoining to the west of the hereindescribed lands and reserving a similar right of way over along and upon the westerly fifteen feet of the hereindescribed lands. The said two strips of land to be used in common for the purpose of a driveway for the owners immediately adjoining to the west and east of the said driveway."

At the time when the action was commenced, the defendants were the owners of Parcel 4 and the plaintiffs were the owners of the second parcel conveyed by the owners of the farm and referred to as Parcel 1. The deed to Parcel 1 includes a grant of the right of way. The plaintiffs claimed that they had the right to authorize other persons to use the strip of land as a means of ingress to and egress from Parcel 1 for the purpose of holding picnic parties on that parcel of land. The defendants denied that the right of way claimed by the plaintiffs was appurtenant to Parcel 1 and in any event they denied that the plaintiffs had a right to authorize other persons to use the right of way for the stated purposes.

The judgment of the trial Judge, Kelly, J., contains a declaration that the plaintiffs are entitled to use a right of way described in schedule to the judgment "for all normal purposes in connection with their lands", and the Court ordered that the defendants and each of them be forever restrained from interfering with the plaintiffs' rights as declared in the judgment. A counterclaim by the defendants Alex Romanuik and Annie Romanuik to prevent the plaintiffs from trespassing upon the right of way and for damages, and a counterclaim made by Catherine Coren, separately from the other defendants, for an injunction restraining the plaintiffs from entering upon and traversing or making use of the right of way except in connection with the ownership or occupancy of one certain part of the plaintiffs' land, were both dismissed.

The defendants Catherine Coren and James Coren appealed from that judgment. The judgment of the Court of Appeal was delivered by Laidlaw, J.A., who said, beginning at page 402,

> It is my opinion that the proper construction and effect of the language used in that grant (the grant of Parcel 4) is that the right of way created thereby was intended by the parties to be and it became appurtenant to all the land remaining in the original parcel after conveyance by the grantors to the purchasers of the part thereof referred to as Parcel 4. The purpose to be served by the strips of land as described was stated to be "for the purpose of a driveway for the owners immediately adjoining to the west and east of the said driveway". The grantors were the owners "imme-

diately adjoining to the west". The land owned by them was in one undivided parcel lying immediately to the west, to the north-west and to the north. The dominant tenement to which the westerly 15 feet of Parcel 4 was servient was the remaining parcel of land owned by the grantors after severance of Parcel 4 from the original parcel. Subsequently the grantors conveyed a second part, Parcel 1, to a purchaser and that parcel is now owned by the plaintiffs. The deed to the purchaser and later from the purchaser to the plaintiffs includes a grant of the right of way now in question. It is settled law that if a severance of the dominant tenement takes place all its easements which are attached to the tenement and not to the person of the owner will attach to every part of the severed lands: *Codling v. Johnson (1829), 9 B & C. 933; Harris v. Drewe (1831), 2 B. & Ad. 164; Newcomen v. Coulson (1877), 5 Ch. D. 133 at 141.* My opinion is therefore that the right of way in question which was appurtenant to the dominant tenement as I have described it attached to Parcel 1 when that part was severed from the dominant tenement. The purchaser of Parcel 1, and subsequently the plaintiffs, acquired a good and valid title to the right of way for the benefit of and appurtenant to Parcel 1.

But the limits of the right existing at the time of severance of that parcel from the dominant tenament cannot be exceeded so as to impose an additional burden on the servient tenement: *Bower v. Hill et al. (1835), 2 Bing. N.C. 339;* Gale on Easements, 12th ed. 1950, p. 85. The limits of the right are determined by reference to the language of the express grant creating the right of way. In a case where that language admits of reasonable doubt as to the nature and extent of the rights the Court may look to the circumstances existing at the time of the grant. In the present case the lands were farm lands and Parcel 1 was bush land at the time the right of way was first created and afterwards. It was expressly stipulated that the strips of land described were "for the purpose of a driveway". It was not intended by the parties that the owners of the right of way should have the unlimited right to authorize any person or persons to use the right of way for any purpose whatsoever. In particular, it was not contemplated that one owner should have the right at any time to authorize large numbers of persons to use the right of way to get to and from Parcel 1 for the purpose of having picnics on that land. Neither the language of the grant nor the circumstances existing at the time thereof support a claim to a right of that extent. I hold that the plaintiffs exceeded their right in authorizing persons to use the right of way for that purpose.

Pearsall and Pearsall v. Power Supermarkets Ltd. (1957), 8 D.L.R. (2d) 270.

Judson, J.:- The plaintiffs are the owners of 97 Moberley Ave. Toronto. This street runs south from Danforth Ave., one block west of Woodbine.. Immediately to the north of 97 Moberley Ave. is a right-of-way 7 ft. wide and extending easterly from Moberley to a depth of 75 ft. The right-of-way was created by instrument dated March 1, 1923 and registered March 14, 1923 as No. 96613T in these terms ...:

"Together with a right of way over the northerly 3' 6" of the land lying immediately to the south of the lands herein described and extending easterly from the easterly limit of Moberley Avenue to a depth of 75' and subject to a right of way over the southerly 3' 6" of the lands herein described and extending easterly from the easterly limit of Moberley Avenue to a depth of 75'; the said two parcels form-

ing a mutual right of way 7' in width for the use in common for all ordinary and usual purposes of the owners and occupants from time to time of the premises immediately adjacent thereto."

... The two parcels entitled to the use of the right-of-way were 97 Moberley Ave. and a parcel having a frontage of 28 ft. 6 ins. on Danforth Ave. and extending south to the eastern end of the right-of-way. The eastern limit of this Danforth Ave. parcel is parallel to and 65 ft. from Moberley Ave.

At the time of the creation of the right-of-way there was an old frame-house on the 28 ft. 6 ins. Danforth Ave. parcel. I will refer from now on to this parcel as the 28 ft. 6 in. strip. The house was set back about 150 ft. from Danforth ... The right-of-way led up to the back verandah of the frame-house. The garage for the frame-house faced Danforth and could be entered only from Danforth. Little or no use was therefore made of the right-of-way in connection with the 28 ft. 6 ins. strip. Immediately to the east of this strip there is a parcel of land having a frontage of 36 ft. 6 ins. on Danforth Ave. This parcel had no right over the right-of-way. In 1928 a bowling alley was erected on the 36 ft. 6 ins. parcel. In 1937 this building became the Power store and the 28 ft. 6 ins. came into Power ownership. In 1937 there was an attempt, by some conveyancing device to attach the right-of-way to the 36 ft. 6 ins. parcel. This, for the reasons that I shall deal with later, cannot be done. It was of no practical importance at the time because the Danforth frontage of the 28 ft. 6 ins. strip had not yet been built upon and this land was used for access to the Power parking lot. The Moberley Ave. right-of-way was not so used.

In 1953 the Power store was extended to cover the 28 ft. 6 ins. strip. This closed the frontage on Danforth. Access to the Power parking lot was obtained by way of Woodbine Ave. In the late summer of 1955 this access was interrupted because of the widening of Woodbine Ave. During this period all the customer parking and most of the truck deliveries for the Power store passed over the right-of-way in question in this action. After the completion of the widening of Woodbine Ave., much less use was made of the right-of-way. I understand that a chain was eventually placed across the right-of-way at the easterly end but the plaintiffs complain that occasionally customers drive up to the chain and some trucks make their deliveries from that point.

The defendant asserts the right to use the right-of-way but proposes to do so only as a convenience at times of major disturbance, when access is impossible from Woodbine Ave. With the exception of the time when Woodbine was being widened the defendant says that it has only made occasional use of the right-of-way.

The first and obvious point of this case is that the defendant cannot use the right-of-way for the purpose of reaching the 36 ft. 6 ins. parcel. At its creation the right-of-way was appurtenant only to the 28 ft. 6 ins. strip. There was an attempt by the predecessor in title of the defendant, by some conveyancing juggling, to which the plaintiff was not a party, to make the right-of-way appurtenant to the 36 ft. 6 ins. parcel. This attempt fails. The law is stated in *Purdom v. Robinson (1899), 30 S.C.R. 64 at p. 71* in these terms:

"That a right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property is shown by many reported

cases of which two cited by the respondent may be particularly referred as establishing the proposition. In *Skull v. Glenister, 16 C.B.N.S. 81,* this was one of the questions decided and Erle C.J. says:

"'This right of way was appurtenant to the land demised by the Wheelers to the defendants. The defendants are therefore bound to make use of this way for purposes exclusively connected with their holding of these demised premises.'"

Other illustrations of the application of this principle are to be found in Miller v. Tipling (1918), 43 D.L.R. 469, 43 O.L.R. 88; Bell v. Marsh, [1951], 3 D.L.R. 486, O.W.N. 433; *Friedman v. Murray, [1953] O.W.N. 486.*

The difficulty in this case is that the 28 ft. 6 ins. strip and the 36 ft. 6 ins. parcel are now in the common ownership of the defendant. There is a large store built upon them and this store operates as a unit. It is quite impossible to separate the use of the right-of-way for the 28 ft. 6 ins. from the use in connection with the 36 ft. 6 ins. parcel. An injunction restraining the defendant from using the right-of-way in connection with the 36 ft. 6 ins. would be ineffective if the defendant were left free to use it in connection with the 28 ft. 6 ins. I am therefore of the opinion that the injunction should restrain the defendant from using the right-of-way in connection with both the strip and the parcel.

There is another aspect of the case that was argued and that I should deal with. When this right-of-way was created in 1923 it was for "all ordinary and usual purposes" in connection with a small house, 97 Moberly Ave. and a frame cottage on the 28 ft. 6 ins. strip. It is true that the strip had a frontage on Danforth Ave. and was potentially land which might be used for business purposes. But this was only a 7-foot right-of-way. It seems to me that a user based upon an invitation to the public to use it as a means of access to a parking lot attached to a busy store and for deliveries to that store which spreads over adjoining land, not entitled to the benefit of the right-of-way is an enlargement of the nature, character and extent of the easement and restrainable by injunction within the principal laid down in *Malden Farms Ltd. v. Nicholson, 3 D.L.R. (2d) 236, [1956] O.R. 415.* To a certain extent the enlargement in the character of the easement arises from the common ownership of the strip and the parcel and the two aspects of the case - non-apparent user and enlargement of user merge into one. My decision can only be based upon the facts and I am saying nothing about what the result might have been if the 28 ft. 6 ins. strip had been built upon for business purposes, quite separate from those of the 26 ft. 6 ins. parcel.

... ...

Judgment for the plaintiff restraining the defendant from using the right-of-way in connection with the 28 ft. 6 ins. strip and the 36 ft. 6 ins. parcel, ...

EXTINGUISHMENT OF EASEMENTS

In *Pharand v. Jean-Louis, [1952] O.R. 665,* the trial judge, Marion Co. Ct. J., of the County Court of the United Counties of Prescott and Russell, said,

This is an action for an injunction restraining the defendant from entering upon certain lands of the plaintiff to use a

water-spring thereon, together with a claim for damages for trespass. The defendant alleges title to a right of way and in turn claims damages for interference therewith, to which the plaintiff pleads abandonment through non-user over a number of years, together with uncertainty in the grant of that right.

One Dominique Jean-Louis, the father of the defendant, at one time owned Lot 41 on the west side of John Street in the village of L'Orignal, shown on a plan filed on the 25th March 1881. He conveyed the north half of this lot, comprising 50 acres of land, to another son, Elie Jean-Louis, on the 15th June 1925, the conveyance being registered as no. 2847, but therein he reserved "a right of way fifty feet in width from the division line between the North Half and the South Half of said Lot Number Forty-one to a spring of water situate at the distance of about five acres from the West side of John Street, said right of way to be used by the said Grantor and his assigns as owners or occupants of the South Half of said Lot Forty-one". The reservation in this deed forms the very basis for this action.

In December 1927 Elie Jean-Louis reconveyed to his father the westerly 30 acres of that north half but he remained owner of the remaining 20 acres thereof, in the south-west area of which is situate the spring in question.

Dominique Jean-Louis died on the 12th May 1926, and the defendant, who had worked the farm with his father up to that time, inherited the lands.

Elie Jean-Louis conveyed his 20 acres to his wife Helene Jean-Louis in May 1934, and the latter sold these lands to the plaintiff on 18th July 1950.

While the evidence disclosed that one Beaudry now owns the most easterly portion, along John Street, of the south half of Lot 41, his lands do not extend sufficiently to the west to play any part in these proceedings, for the purposes of which the plaintiff's lands may be taken as bounded to the south and to the west by the lands of the defendant; the southerly boundary of the plaintiff's lands is the dividing-line between the north and south halves of Lot 41, and this spring is located about 147 feet north of this dividing-line, opposite the lands of the defendant. This dividing-line will be referred to in the course of this decision as the "common line".

I find that Elie Jean-Louis occupied his 50 acres until the end of 1927, when he reconveyed 30 acres to his father, and that he rented the remaining 20 acres to the defendant, with whom he always remained on friendly terms, during the seasons of 1928 and 1929. I also find that Elie Jean-Louis resumed possession of these 20 acres in 1930 and remained in possession either in his own right or through the ownership of his wife, until 1950, when the latter sold to the plaintiff. It appears that during the lifetime of Dominique Jean-Louis all the farm was used more or less in common, but I accept the evidence of Elie Jean-Louis, called by the plaintiff, to the effect that he fenced his 20 acres in 1930; this witness states that the defendant wanted a gate to reach the spring when the fence was built, but that request was refused. The defendant, while contending that the fence was built only in 1934, confirmed the story about his request for a gate. He states, and I accept his statement on that point, that upon the refusal of the gate he consulted one Poulin, a justice of the peace, who misconstrued the meaning of the right of way reservation in deed no. 2847, hence his forbearance to claim that right until June 1951. [Editor's note: It appeared in the evidence that the plaintiff's predecessor in title had also consulted Poulin at this time, and was relying on his advice.]

It appears that some difficulty arose between the parties to this action concerning the defendant's cattle, and this prompted the defendant to have the right of way clause interpreted by a solicitor. Following some advice, the defendant cut open the fence on the common line opposite the spring in June 1951, and claimed a right of way to that spring. The defendant's horses were led to this spring and later an attempt was made to lead some cattle there. The defendant fenced in the spring, but that fence was taken down by or for the plaintiff, who also closed up the fence on the common line; the plaintiff also blocked up the spring with stones and matters generally stood thus when this case came to trial.

Non-user of a right of way alone does not amount to an abandonment. In *Baker v. Harris, 64 O.L.R. 513, [1930] 1 D.L.R. 354,* Kelly J. states at p. 516: "There is no hard and fast rule that 20 years' non-user raises even a *prima facie* presumption of release. The cesser in the exercise of the right may moreover, be explained in such a manner that the non-user will not affect the question of abandonment in the least, if, that is, it can be shewn to have been due to some sufficient cause other than an apparent intention of the dominant owner to abandon his right."

In *Seaman v. Vawdrey (1810), 16 Ves. 390, 33 E.R. 1032,* non-user for over 100 years did not lead to the presumption of abandonment.

The onus of establishing the loss or extinction of the right of way by abandonment or non-user rests upon the servient owner, in the present case the plaintiff. I am not unmindful of the fact that in this case there was continuous non-user of the right of way for 21 years, that no claim was made by the defendant during that period, and that there was from 1930 continuous adverse obstruction through the erection of the fence. All this together might lead to the application of the principle of the case on abandonment, *Bell v. Golding (1896), 23 O.A.R. 485.* However, abandonment of an easement, especially one created by express grant as in this case, is a matter of intention; the right is not lost by mere non-user: *Liscombe v. Maughan, 62 O.L.R. 328, [1938] 3 D.L.R. 397.*

Can it be said in this case that the defendant, the dominant owner, knowingly and with full appreciation of his rights directed his mind to abandon that right of way when he suffered the erection of the fence in 1930 and then abstained from using the right of way until 1951? Did he abstain *scienter*?

After a careful appreciation of the evidence I must answer these two questions in the negative. The defendant, in my opinion, was most anxious to safeguard his right to reach the spring. When the fence was erected he insisted upon that right and desisted only after being wrongly advised that the easement, as described in the deed, would grant him a right of way westerly from John Street along only the southerly 50 feet of what is now the plaintiff's property, thereby denying him any possible access to the spring, which lies at 147 feet from the southerly limit of that property. As soon as he was differently advised, in 1951, the defendant lost no time in insisting upon his rights. This to my mind, denotes that the defendant never intended in the least to abandon the easement.

The plaintiff's action was dismissed with costs. On appeal, the judgment of the lower Court was varied on other grounds.

Baker v. Harris (1929), 36 O.W.N. 188, was an action to establish a right of way and to restrain the defendant from interfering with the plaintiff's user of it.

Kelly, J., in a written judgment, said that

> the plaintiff was the owner of a house and premises in Toronto, and the defendant the owner of a house and premises immediately adjoining the plaintiff's property on the south. In 1907 both parcels were vested in one Case, who in that year conveyed to the plaintiff's predecessor in title the parcel now owned by the plaintiff, and in October, 1908, conveyed the other to the defendant's predecessor. In these conveyances and in every other conveyance of these parcels there is contained a grant of what has been called "a mutual right of way" over the northerly 5 feet of the defendant's land and the southerly 2 feet of the plaintiff's lands to a depth in each case of 75 feet from the westerly limit of Close-avenue, on which both premises front. At and prior to the time of the conveyances to the present parties, there was a gate across the 7-foot strip, at a distance of about 60 feet from the westerly limit of Close-avenue, and a fence ran from the line of the gateway westerly to the rear limit of the properties, which was intended to be but which was not exactly on the dividing line between the two parcels. The defendant used the gateway as access, over the strip, to the rear portion of her lands, such use being mainly for her motor-car. The plaintiff in the early years of her ownership used the strip only as far as the side-door leading into her house. During that time she had no occasion to use any other part of the strip. But in 1925 she had occasion to use it to a greater depth, and she made alterations by which she could enter her premises at a point immediately to the east of the gateway and directly opposite a side-door in the extension of her house. Until shortly before the disagreement which resulted in this action, she had no occasion, in order to enter her premises to use the part of the strip to the west of the gate. Then however, contemplating the acquiring of a motor-car, she needed to use the strip to its full depth of 75 feet. The division-fence between the properties having fallen about the end of 1927, when the question of replacing it arose, the plaintiff proposed the construction of a concrete way along the division line between the rear portions of the properties for the common use of the parties. The defendant objected, and, against the plaintiff's objection, had the division-fence rebuilt.
>
> This action followed, in which the defendant set up that the plaintiff had lost, by abandonment or otherwise, her right to use any portion of the strip lying to the west of the gate.
>
> There is no evidence of any written or express grant, release, surrender, or abandonment of that right by the plaintiff or those through whom she claims; and, therefore, the defendant cannot succeed unless, from the circumstances or from the conduct or actions of the plaintiff, such a release, surrender, or abandonment could be reasonably inferred.
>
> The principles of law applied to the extinguishment of easements are set forth in Halsbury's Laws of England, vol. 11, pp. 276 to 280, where a long line of decisions is cited.

The learned Judge refers especially to *James v. Stevenson, [1893] A.C. 162,* which resembles the present case, in as much as in each the party asserting a right to the way over the entire strip used an important part of it without disturbance. There

is here an additional factor which adds strength to the plaintiff's position. From the conveyance of the plaintiff's property by Case in June, 1907, in which this right of way was first created and defined in writing, until and including the conveyance to the plaintiff in August, 1919, each of the several successive registered conveyances of the plaintiff's property contains a grant of this right of way; and so with the registered conveyances of the defendant's property.

There was no abandonment or surrender by the plaintiff of her right to use the strip; and she is entitled to such use and to the removal by the defendant of any obstruction placed by the latter upon it; and the defendant should be restrained from further obstructing it.

... ...

The following is from the headnote in *McClellan v. Powassan Lumber Co. (1907), 15 O.L.R. 67,* in which a Divisional Court reversed the trial Judge:

> Unity of ownership or seisin in fee extinguishes all pre-existing easements or private rights of way over one part of the land for the accommodation of another part; and an easement so extinguished can can only be revived by a fresh grant, and then the right granted is of a new thing; the severance again of the land in respect of which an easement formerly existed over one part for the benefit of the other does not *per se* revive the extinguished easement, if the dominant part is first granted and the servient part retained by the owner who made the severance.
>
> *Wheeldon v. Burrows (1879), 12 Ch. D. 31,* followed.
>
> Previous to 1891 two adjoining parcels of land known as the grist mill property and the saw mill property were in different holders, and there was on the land, well defined on the ground, a road leading from the highway to the grist mill over a part of the saw mill property. In 1891 the two properties became united in the same owner, who in 1894 conveyed all the land excepting certain lots, on one of which stood the grist mill. In the document of transfer there were no words to indicate that any right of way over the rest of the land conveyed was also excluded. The grist mill property was afterwards conveyed to the plaintiff, who claimed the right to use the road over the saw mill property as marked upon the ground:-
>
> Held, that when the transfer of 1894 was made, the road was not a subsisting easement or right of way, though it was marked upon the ground as a former right of way, which continued to be used for the owner of the whole property after he became such owner; failing an express reservation in the transfer of 1894, none was to be implied; and the fact that the title to all the lands in question had been brought under the Land Titles Act made no difference, there being nothing in the provisions of sec. 26 or other sections to affect the result in the plaintiff's favour; ...

PART 9 - REGISTERED PLANS OF SUBDIVISION

REGISTRATION OF PLANS OR MAPS OF TOWN OR VILLAGE LOTS PERMITTED

Section 33 of The Registry Act, 9 Vic. ch. 34, an Act to consolidate and amend the Registry Laws of that part of this Province which was formerly Upper Canada, [Passed 9th June, 1846.] was as follows.

> 33. And be it enacted, that any person, corporation or company of persons, who have heretofore or shall hereafter survey and subdivide any land into town or village lots, differing from the manner in which such lands were described as granted by the Crown, it shall and may be lawful for such person, corporation or company, to lodge with the Register of the County a plan or map of such town or village lots, shewing the numbers and ranges of such lots, and the names, sites and boundaries of the streets or lanes by which such lots may be in whole or in part bounded, together with a declaration to be signed by such person, or by the lawful officer, agent or attorney of such corporation or company, that the plan contains a true description of the lots and streets laid out and appropriated by such person, corporation or company, and thenceforth it shall be lawful for the Register to keep an index of the land described on such map or plan as a town or village, or part of a town or village, by the name by which such person, corporation or company shall designate the same.

In *In Re Morton and The Corporation of the City of St. Thomas (1881), 6 App. Rep. 323,* Patterson, J.A., said,

> This Act [The Registry Act, 9 Vic. ch. 34] was merely permissive. It permitted the person, &c., to lodge the map or plan showing the numbers and ranges of the lots and the names, sites, and boundaries of the streets or lanes by which such lots might be in whole or in part bounded; but it gave no statutory effect to the plan with regard to the lots, or to streets or lanes.
>
> In 1865 registration of plans was made compulsory by the Registry Act, 29 Vic. ch. 24, and conveyances of lands designated upon them were required to conform to the plans, on penalty of not being registered. The draftsman of the clause, sec. 73, would seem to have had in his mind only plans of the first subdivisions of lots as originally granted by the Crown; but the language can, with some liberality of construction in matters of detail, be applied to successive subdivisions. This statute also declared that the plan should not be binding on the person filing or registering it, or upon any other person, unless a sale had been made according to it; and further made provisions for making amendments or alterations of plans under a Judge's order.
>
> The only remark necessary to make respecting these statutes is, that they do not profess to deal with the subject of public highways; they deal with the registration of titles and with private rights connected with or affected by registration; and, when they assume to make registered plans binding, that effect extends only to the subdivisions as recognized in registration, and to titles acquired by conveyances in conformity with registered plans.

In 1849, an Act to repeal certain Acts therein mentioned, and to make better provision respecting the admission of Land Surveyors

and the Survey of Lands in this Province, was enacted by 12 Vic. ch. 35, sections 33 and 41 of which are as follows,

> 33. And be it enacted that in every City, Town or Village in Upper-Canada, which has been surveyed by the authority aforesaid, [viz., under the authority of the Executive Government of the late Province of Quebec or of Upper-Canada, or under the authority of the Executive Government of this Province] all allowances for roads, street or streets, lane or lanes, common or commons, which have been laid out in the original survey of such City, Town or Village, shall be and the same are hereby declared to be public highways and commons; and all posts or monuments which have been placed or planted in the original survey of such City, Town or Village, to designate or define any allowance for road or roads, street or streets, lane or lanes, lot or lots, common or commons, shall be and the same are hereby declared to be the true and unalterable boundaries of all such roads, streets, lanes, lots and commons; and all land surveyors, when employed to make surveys in such City, Town or Village are hereby required to follow and pursue the same rules and regulations in respect of such surveys as is by law required of them when employed in Townships.
>
> 41. And whereas many Towns and Villages in Upper-Canada have been surveyed and laid out by companies and individuals, and by different owners of the lands comprising the same, and the lands have been sold therein according to the surveys and plans thereof: Be it therefore enacted That all allowances for road, street or streets, common or commons, which have been surveyed in such Towns and Villages in Upper-Canada, and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for road, street or streets, common or commons, have been sold to purchasers, shall be and the same are hereby declared to be public highways, streets and commons; and all lines which have been run, and the courses thereof given in the survey of such Towns and Villages, and laid down on the plans thereof, and all posts or monuments which have been placed or planted in the first survey of such Towns and Villages to designate or define any such allowances for road, street or streets, lot or lots, common or commons, shall be and the same are hereby declared to be the true and unalterable lines and boundaries of all such allowances for such road, street or streets, lot or lots, common or commons, in such Towns and Villages, respectively: Provided always, that no lot or lots of land in such Towns and Villages shall be so laid out as to interfere with, obstruct, shut up, or compose any part of any allowance for road, common or commons, which was surveyed and reserved in the original survey of the Township or Townships wherein such Towns or Villages are or may be situate: Provided also, that any owner or owners of any such Towns and Villages, or the owner of any original division thereof, shall have lawful right to amend or alter the first survey and plan of any such Town or Village, or any original particular division thereof, provided no lots of land have been sold fronting on or adjoining any street or streets, common or commons where such alteration is required to be made: Provided also, that from and after the passing of this Act, no such private survey shall be valid, unless performed by a duly authorized Surveyor.

In 1861, an Act respecting Maps or Plans of Towns or Villages in Upper Canada [Assented to 18th May, 1861.] was enacted. The pre-

amble to the Act, 24 Vic. ch. 49, and the provisions thereby enacted are as follows,

> In amendment of the thirty-fifth and following sections of the Act respecting the survey of lands in Upper Canada, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:
>
> 1. Any owner or owners of any Town or Village, or of any original division of any Town or Village, in Upper Canada, of which a plan or map has been made, certified, deposited and recorded, in pursuance of the provisions of the said sections, may cause a new survey and plan thereof, altering, or wholly or partially cancelling and making void the first survey and plan thereof, and the division of the land thereby into lots and allowances for roads, streets, and commons, to be performed, made, certified, deposited and recorded, in pursuance of such provisions; and thereupon such first survey and plan shall be altered, or wholly or partially cancelled, and made void accordingly; Provided, always, that no part of any street or streets shall be altered or closed up, upon which any lot of land sold in such town or village or original division thereof abuts, or which connects any such sold lot with or affords means of access therefrom to the nearest public highway; and provided, also, that nothing contained in this Act shall in any way interfere with the powers now possessed by municipalities in reference to highways.
>
> 2. So much of the provisions of the said sections as are not inconsistent with those of this Act shall apply to surveys, maps, and plans, performed and made in pursuance of this Act.

The facts in *In Re Morton and The Corporation of the City of St. Thomas (1881), 6 App. Rep. 323,* were these,

E. W. Harris bought town lot No. 5, on which the lane in question was laid down, in the year 1856, and in that year subdivided it into six lots, three of which fronted on Talbot street and three on Pearl street, separated by the lane in question, which Mr. Harris swore was intended as a private way for the use of the purchasers of the subdivision lots. The plan was duly registered. In the following year he conveyed three of the lots in accordance with the plan, taking mortgages for the purchase money from the vendees of two of them. None of the purchasers ever went into possession, and Harris alone retained it and used and rented the whole property as his own in one parcel. After some years, the mortgagors being unable to redeem, the lots were all reconveyed to him. The lane was never opened, nor was the plan ever recognized further than by its registration and the conveyances referred to, and the lot ... always remained fenced in and used as one entire parcel of land until it was conveyed by Harris to the Molsons Bank, in May 1876, a period of nearly twenty years. After this, and until the bank premises were finished, the fences around the lot were down in some places for about two years, but the lane was never used, or any rights claimed in it by the corporation or the public, or any one else, and the bank subsequently enclosed the whole in a new fence, using the rear of the lot, including the lane, as a garden.

It appears quite clearly from the affidavits that Mr. Harris,

and those claiming under him, retained exclusive possession of the whole lot as one parcel, entirely disregarding the subdivisions, except as ...mentioned, from 1856 to October, 1880, when the fences which the bank had erected were torn down, by order of the council, and the lane thrown open; and further, that no right to the lane was ever claimed or relied upon by the owners of any adjoining lot until shortly before the month of June, 1880.

The by-law for opening the lane was passed on the 3rd August, 1880, in pursuance of notice given under the Municipal Act, in the previous June, and it is sworn, and not denied, that the only person who petitioned for its passage was Dr. Duncan McLarty, formerly mayor of the town, the owner of the adjoining lot No. 4, who had recently erected buildings across the whole front of that lot, and laid out, at his own expense, and conveyed to the corporation a lane across it, in continuation of the lane alleged to exist on lot 5.

Osler, J., the trial Judge, said, [Note *(a), p. 325*]

> I think the by-law should be quashed, because the council in passing it were not using their powers, if they had any in the particular case, in good faith in the interest of the public, but simply to subserve the interests of private persons ... The rule will therefore be absolute to quash the same with costs.

On appeal,

Burton, J.A., said, at p. 329,

> Apart from the Registry Act altogether, no one would think of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shown upon the plan adjoining the lots sold, which places them beyond the vendor's future control to their injury.
>
> It was admitted upon the argument that the mere registration of such a plan would not conclude the owner or confer any rights upon the public, although he might possibly - until the passing of ch. 93 of the Consolidated Statutes, [the Act respecting the Survey of Lands in Upper Canada, 12 Vic. ch. 35, *supra*, p. 94] subsequently varied and amended by the 24th Vic. ch. 49 [*supra*, pp. 94 and 95] - have been subjected to some inconvenience by the refusal of the registrar, after the registration of such a plan, to receive for registration a conveyance of the land, or any portion of it, described otherwise than in accordance with such sub-division. Then how would the public acquire rights by the mere sale. The purchasers could unquestionably insist upon the lane being kept open for their use, but is it not clear that by agreement among themselves they could abstain from opening it altogether or enforce its being maintained as a private way? Does it not follow that the owner might, therefore, under such circumstance by a re-purchase of all the lots sold, at all events before any actual use of the lane, re-invest him-

self with the same rights and dominion over the property which he had before the sale.

How then is the question affected by the Registry Act? It is manifest that a registry law would be of little avail in cases where the original lot had been surveyed or subdivided into other lots in such manner that by the new description the parcel conveyed could not be easily identified, if it were not made obligatory upon proprietors to register a plan of such new survey, and upon the Registrar to keep an index of the new survey, and to register no conveyance affecting the land so subdivided, unless made in conformity with it; but it was not intended to alter the relative rights of vendors and purchasers, or to confer any additional right upon the public than they would have had under a sale made in accordance with an unregistered plan.

The 67th section of the Surveys Act (R.S.O. 1877) [Section 41, 12 Vic. c. 35, p. 94, *supra*.] applies only to allowances for roads, streets and commons which have been surveyed and laid out by a private proprietor, in the laying out of a town or village, and has no application to the case we are now considering.

Returning to the judgment of Patterson, J.A., he said, at p. 335,

It may be worth while to make two further observations concerning our statutes on the subject of these highways. One is that the statute 12 Vic. ch. 35, contained two enactments respecting the laying out of towns and villages; viz., that of sec, 41, already referred to [p. 94, *supra*,] which dealt with the case of private surveys, and another contained in sec. 33 [p. 94, *supra*,] ... on the subject of public surveys. In the former, as has been pointed out, lanes are not mentioned, but only roads, streets and commons, while the latter embraces roads, streets, lanes and commons as the allowances which are to be public highways and commons.

The other observation is, that the general definition of common and public highways, which originated in 1810, in 50 Geo. III. ch. 1, sec. 12, and has been repeated with slight verbal changes in all our Municipal Statutes ..., has never included a highway established by no other acts than those relied on by the defendants in this case.

I shall merely add, with reference to the ground on which Mr. Justice Osler quashed this by-law, that in my judgment, the abuse by the council of its powers in the interest of an individual becomes more striking when the absence of legal justification is understood.

The appeal was dismissed.

In *McGregor v. The Municipal Corporation of the Village of Watford et al. (1906), 13 O.L.R. 10,* an action was brought against the municipal corporation to quash a by-law by which the defendants had assumed to deal with a certain plot of land in the village as a public highway for the alleged purpose of closing the same, and for an injunction restraining them from further entering on or dealing with the plot, under the circumstances mentioned in the judgment.

Boyd, C., said,

The *locus in quo* was marked as a street on a registered plan made and filed, no doubt, while yet the locality was part of the township, but yet practically contemporaneously with its being set apart as an incorporated village. The plan filed on June 3rd, 1873, was no doubt in actual anticipation of the incorporation of the village, which was consumated on June 25th, 1873. The first sale of lots made in recognition and affirmance of the plan by the owner was in 1876. Subsequent legislation which was retroactive declared that allowances for roads which had been or might be laid out in cities, towns and villages, and fronting upon which lots have been sold, should become public highways. See R.S.O. (1887) ch. 152; [50 Vic. ch. 25, s. 62.] *Roche v. Ryan (1891), 22 O.R. 107; Sklitzsky v. Cranston (1892), ibid. 591, 593;* and *Gooderham v. Corporation of the City of Toronto, 25 S.C.R. 246, at pp. 261, 262.* I am disposed to hold also, if it was necessary, that the road in question laid out in 1873 has been so used and controlled by the municipality and so abandoned by the owner and his successors in title, as to entitle the defendants to deal with it as they have done.

Township of Pickering v. Croker (1923), 24 O.W.N. 534. An action was brought by the Municipal Corporation of the Township of Pickering for a declaration that certain lands in what is called the village of Fairport are public highways and for an order for the removal of certain fences and other obstructions maintained by the defendants.

Rose, J., said,

the lands were described as that part of Pleasant street lying between Bay street and the waters of Frenchman's Bay, as laid down on Palmer's plan, and the south half of Bay street from Pleasant street to the waters of Frenchman's bay, as laid down on Gardiner's plan, which was dated the 21st August, 1848, and was registered on the 6th October, 1848. It is called a plan of the village of Fairport on lot 23 in the broken front of the township. The land shewn on it comprises "Bay street" and land to the north of that street, not here in question.

Before the plan was filed, Gardiner, on the 29th August, 1848, had conveyed to one Tool all the land in which the so-called streets are situate. In the deed to Tool there was no reference to the plan. The land conveyed was described as 25 acres more or less, part of lot 23, and the metes and bounds were given - the description including the south half of Bay street between Pleasant street and Frenchman's bay, the land here in question.

The deed to Tool was registered at 11 o'clock a.m. on the same day as the plan. The hour at which the plan was registered was not stated in the certificate .

In 1848 there was no statute which declared that allowances for streets laid down on plans should be public highways. The earliest legislation of that kind appeared to have been in 1849, 12 Vict. ch. 35, secs. 41, 42; and that statute related only to allowances for streets in towns and villages - the extension of it to townships did not come until 1897, by 60 Vict. ch. 27, sec. 20 - and Fairport, being unincorporated, was not such a "village" as is referred to in the Act: Sklitzsky v. Cranston (1892), 22 O.R.

590. The filing of the plan, then, even if there were sales according to it - and certainly there were none before the registration of Tool's deed - had no statutory effect. At most, the preparation and filing of it evidenced an intention on the part of Gardiner to dedicate - an offer of the land to the public as a highway - and the grant to Tool was a prompt revocation of the offer. Tool, therefore, acquired an absolute title to the south half of Bay street; and, if the part of that south half as to which a declaration was sought ever became a highway, it did so as the result of some act later in time.

Palmer became the owner of the land that had been conveyed to Tool - i.e., of all the land lying south of the middle line of Bay street. In 1853 he caused to be made a plan inscribed "Plan shewing the position of Wharf and Pleasant streets on lot No. 23 and lot A. in the 3rd range of the broken front of the township of Pickering." This was registered on the 3rd February, 1877. It was a continuation southerly of the Gardiner plan, shewing faintly what appeared on Gardiner's plan, and distinctly the location of Pleasant and Wharf streets. Gardiner's plan shewed a subdivision into building lots of the larger blocks of land intersected by the streets; but Palmer's plan did not shew any subdivision of the southern portion.

The filing of Palmer's plan in 1877 did not make the streets shewn on it answer the description of streets laid down on the plan of a village - the Act then in force was C.S.U.C. ch. 93, sec. 35, the Revised Statutes of 1877, in which the Act was ch. 146, sec. 67, not having come into force - for Fairport was not a "village:" and there was no record of a sale by the defendant Bell or predecessor in title, made after townships were brought within the purview of the Act as it stood after the amendment of that year, to operate upon Pleasant street as shewn on Palmer's plan, even if any such later sale could have the effect of causing a street shewn upon a plan before 1897 to become a public highway. The statute, in the learned Judge's opinion, had nothing to do with the case.

It was said that, apart from the statute, there was a dedication of the streets - an offer of them to the public and a dedication by user; but that was not made out. There was no acceptance by the public of any offer to dedicate Bay street or that part of Pleasant street which lies north of Wharf street. [See THE COMMON LAW METHOD OF ESTABLISHING A ROAD OR HIGHWAY at p. 22, *supra*.]

In *Gregory v. Edwards and Corporation of Village of Hastings, [1962] O.R. 993,* the plaintiff asked for a declaration that a strip of land 66 feet in width, which lies immediately east of her lands and between Front St. and the river Trent in the Village of Hastings in the County of Northumberland, is a public street.

Grant, J., said,

The land in dispute (hereinafter referred to as "the area") was originally part of the east half of lot 4 in the 7th concession of the Tp. of Asphodel in the County of Peterborough. The Village of Hastings was constituted by a special Act of the Ontario Legislature, passed in the year 1874, [c. 67] and assented to on March 24, 1874. By that Act the Village of Hastings is declared to consist of certain lands including the above, with the intervening roads, streets and highways, and the same is annexed to and made a part of the County of Northumberland and Durham. The incorporation of the village into such adjoining

county required transfer of the abstract and various registered instruments from the Registry Office in the County of Peterborough to that in East Northumberland.

The plaintiff's lands are described as part of the east half of said lot 4 lying south of Front St. and extending in a southerly direction to the Trent River and easterly to the production southerly of Elizabeth St; Front St. runs easterly and westerly and is the first street north of such river; ... It is common ground that north of Front St. Elizabeth St. is a road maintained and under the jurisdiction of the defendant village. It was shown as such on the plan of the village filed originally in the Registry Office of the County of Peterborough on March 30, 1861 as plan No. 3 (ex. 1). At this time such lands were still part of the said township and the village was then not incorporated; such plan became No. 13 when transferred to the records of the Registry Office for East Northumberland; it bears no lines indicating a continuation of Elizabeth St. south of Front St. but the line along the south limit of Front St. is broken opposite Elizabeth St. I shall hereafter refer to it as the first plan; at this time one Henry Fowlds was the owner of the area and surrounding lands south of Front St. according to the abstract filed as ex. 11.

The first plan [in addition to certificates] also bears a notation to the effect that the red on the plan includes the original survey, the blue the division of property, and the dotted lines the concession. The area is not within the part enclosed in red and was apparently therefore not part of the original survey. It is headed "Plan of the Village of Hastings".

A second plan made by Thomas J. Dennehey, Ontario land surveyor, dated November 1864, was filed in the Registry Office for the registry division of Peterborough in October of 1868; it bears lines indicating the east and west limits of Elizabeth St. to continue south from Front St. to the river; this plan also purports to be signed on the back by Henry Fowlds. In any further reference to this plan, it will be called the second plan.

Respecting the second plan, Grant, J., concluded that it certainly is not a plan by which the original farmlands were subdivided but may be a combination of earlier plans with some additions thereto ... He then goes on to say, at p. 996,

It is common ground that this disputed area was not laid out as a street by original survey; no by-law was ever passed by either the Tp. of Asphodel or by the said village assuming it as a road or street; no work has ever been done on the same by way of statute labour and no public monies were ever expended thereon. There has never been any conveyance by the owner of such land to the municipality and there is no evidence whatever of dedication by any owner or acceptance of the same by the municipality of either such township or village as a road or street; the same has never been opened to the public use.

And at p. 1001 he says,

The only basis on which the plaintiff can suggest that the said area is a public road or street allowance is by virtue of s. 56(1) of the Surveys Act, R.S.O. 1960, c. 390 ... [See THE SURVEYS ACT, R.S.O. 1970, ch. 453, **s. 57(1), at p. 107, *infra*.**]

The enactment is retroactive: *McGregor v. Village of Watford et al. (1906), 13 O.L.R. 10; Jones v. Tp. of Tuckersmith (1915), 23 D.L.R. 569, 33 O.L.R. 634 [revd (1917), 47 D.L.R. 684, 45 O.L.R. 67].*

However, I do not think that the above quoted section of the Surveys Act either as it stands now or in any of its earlier forms, had the effect of establishing the area as a public highway or street; as I have said, there is a great deal of confusion as to the origin of plan No. 2 and how it came among the records of the Registry Office in Peterborough. The section deals with the effects of allowances for roads surveyed and laid out by companies or individuals and shown on the plan thereof. I take it that the company or individual who causes the land to be surveyed and highways laid out thereon must be the owner of the land in question. In the present case such was apparently not the case; at the time of the filing of the second plan Henry Fowlds was the owner of the area but not of the greater portion of the village shown on such plan; at that time no subdivision was being made of that part of lot 4 which lies south of Front St. and I believe that ex. 2 was merely a compilation of existing plans to show the whole area of the village as it existed for the convenience of those searching titles and probably for the assistance of village authorities; Henry Fowlds was certainly not the one who caused plan No. 2 to be made out and there is no evidence in this case that he was in any way responsible for showing the lines of Elizabeth St. as continuing south of Front St., the plaintiff has failed to establish that the second plan or exs. 3 and 5 which are merely copies thereof, come within the above section.

The requirements for filing such plans in the Registry Office in 1868 were not as we find them in the Registry Act today; [R.S.O. 1960, ch. 348] under present legislation the consent of the municipality must be attached to a plan of survey which lays down or indicates a part of the land shown as a public highway; this gives the municipality authority over the location and other important matters in the laying out of its highways; their consent to the registration of the plan is evidence of their acceptance of the highway or streets shown on such plan.

Plan No. 2 was not a subdivision plan by which sales were made according to the plan and title to the area was not vested in the municipality as in the cases of *Re Westwood Addition, Hamilton, [1945] 2 D.L.R. 300, [1945] O.R. 257, and Boland v. Baker & Tp. of North York, [1953] 2 D.L.R. 455, [1953] O.R. 239.*

REGISTRATION OF PLANS OF SUBDIVISION

Section 78 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, is as follows,

78.-(1) A plan of subdivision shall not be registered unless it has been prepared by a surveyor and unless it complies with the regulations.

(2) An instrument that refers to a plan of subdivision shall not be registered unless the plan of subdivision is registered.

(3) Subject to sections 23 and 84 and subsection 5 of section 54, an instrument affecting the land on a plan of subdivision or any part thereof, executed after the plan is registered, except an instrument

registered under subsection 1 or 6 of section 18 and a certificate of discharge purporting to completely discharge a mortgage, shall not be registered unless it refers and conforms to the plan.

(4) The consent of the mortgagee to a plan of subdivision, when registered, discharges from the mortgage any land dedicated by the owner as a public highway and any land designated as a reserve that is conveyed to the corporation of the municipality in which the land is situate.

(5) Any public or private street, way, lane or alley, or block, tract or lot, being the only access to a lot or lots laid down on a plan of subdivision, shall be deemed to be a street or highway.

(6) The registrar shall not register a plan of subdivision of land for which a Crown patent has not issued unless the assent of the Minister of Natural Resources to the registration is endorsed on the plan.

(7) The registrar shall not register a plan of a subdivision of land unless the person by whom or on whose behalf the plan is tendered for registration appears on the registry books to be the owner of the land, or unless the consent in writing of every person who appears by the registry books to be a mortgagee of the land is endorsed on the plan and signed by every such person, but nothing in this section shall be deemed to require the consent to any such plan of the owner of an easement or right in the nature of an easement in respect of the land.

(8) No plan to which THE PLANNING ACT applies, except a plan registered under section 81, 89 or 90 of this Act, shall be registered unless approved under THE PLANNING ACT.

(9) Nothwithstanding subsection 3 of section 25 and subsection 8 of this section, the consents of the mortgagees and the required affidavits may be omitted from the plan if they are included in an instrument, to be known as a "Plan Document", in the form prescribed and registered in the manner provided by the regulations.

(10) A registered plan of subdivision is not binding on the person who registered it or upon any other person unless a deed or mortgage in which the land is described in accordance with the plan has been registered.

(11) A plan of subdivision of land that is within an area to which THE LAND TITLES ACT applies shall not be registered under this Act, subject to subsection 2 of section 160a of THE LAND TITLES ACT. [New by 1972, ch. 133, s. 30 (in force April 1, 1973).]

UNREGISTERED SURVEYS OR SUBDIVISIONS

Section 88 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, says,

88. Where land has been sold in accordance with or by reference to surveys or subdivisions that so differ from the manner in which the land was surveyed or granted by the Crown that parcels so sold cannot be easily identified unless the plan is registered, the plan shall be registered if still in existence and procurable for registration.

MUNICIPAL PLANS

Section 89 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, reads as follows,

89.-(1) Where land in a municipality has been sold under surveys or subdivisions made in a manner that so differs from that in which the land was surveyed or granted by the Crown that the parcels sold cannot be easily identified, and the plan has not been registered, the council of the municipality may cause a plan of the land to be made and, with the approval of the Director endorsed thereon, registered, and the expenses of the preparation and registration of the plan may be paid in whole or in part by a special rate to be levied by assessment on the land comprised in the plan as described in a by-law to be passed for the purpose of levying such rate.

(2) A plan prepared under subsection 1 shall show such subdivisions of original lots as are shown by registered plans, and such as are not so shown but appear from the instruments relating to the land, with each of the lots as shown on the new plan numbered or lettered in such a manner that they may be readily identified.

(3) A plan under this section shall be prepared and registered in accordance with the regulations.

(4) Where a plan is registered under this section,

(a) subject to section 84, an instrument affecting the land executed after the plan is registered, except an instrument registered under subsection 1 or 6 of section 18, shall not be registered unless it refers to the plan, and

(b) the plan is binding on all persons subsequently dealing with the land or any part thereof included in the plan or any interest in or concerning the same, but does not affect the rights or interests of any owner or other person entitled at or before the date of registration.

WHEN REGISTERED PLAN NOT SIGNED BY AN OWNER BECOMES BINDING

Section 85 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, provides as follows,

85.-(1) Where a parcel of land has been included in a registered plan of subdivision that was not signed by the owner of the parcel and the parcel is subsequently described in a registered deed or other conveyance as being within the plan, the plan is binding upon the grantee of the parcel and all persons claiming under him as if the plan had been signed by the owner of the parcel.

(2) Subsection 1 does not affect the rights of a mortgagee whose mortgage was registered before the deed or other conveyance, mentioned in subsection 1, was registered.

WHEN REGISTERED PLAN BINDING

Subsection 10 of section 78 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, says,

> 78.-(10) A registered plan of subdivision is not binding on the person who registered it or upon any other person unless a deed or mortgage in which the land is described in accordance with the plan has been registered.

Section 88 of The Registry Act, R.S.O. 1937, ch. 170, was as follows,

> 88.-(1) A plan, although registered, shall not be binding on the person registering the same, or upon any other person unless a sale has been made according to such plan, and in all cases amendments or alterations thereof may be authorized or ordered by a judge of the Supreme Court or by a judge of the county or district court of the county or district in which the land lies, on application for the purpose and upon hearing all persons concerned, upon such terms and conditions as to costs and otherwise as may be deemed just.
>
> (2) Any such application may be made either by the person filing the plan or by the owner for the time being of any of the land covered thereby.
>
> (3) An appeal shall lie from any such order to the Court of Appeal.
>
> (4) No part of a road, street, lane, or alley upon which any lot of land sold abuts, or which connects any such lot with or affords access therefrom to the nearest public highway, shall be altered or closed up without the consent of the owner of such lot; but nothing herein shall interfere with the powers of municipal corporations with reference to highways.

The above section, with only minor changes in language, appeared in the 1950 and 1960 revisions of the Statutes of Ontario. The section, then section 91, was amended by The Registry Amendment Act, 1964. Subsection 1 and 2 of section 91 were repealed and the following subsections substituted therefor,

> (1) A registered plan is not binding on the person who registered it or upon any other person unless a deed or mortgage in which the land is described in accordance with the plan has been registered.
>
> (2) Upon the application of the person by whom a plan was registered or his assigns, or of the owner for the time being of land within the plan, a judge of the Supreme Court or a judge of the county or district court of the county or district in which the land lies may authorize or order amendments or alterations to be made to the registered plan.

And, at the same time, the following subsection was added to the said section 91,

> (5) Nothing in this section prevents the registration of a plan of re-subdivision if, where a public highway is affected by the

re-subdivision, the proper officers of the authority having jurisdiction and control over the highway consent to the plan.

Section 91 of The Registry Act, R.S.O. 1960, ch. 348, as amended by section 24 of The Registry Amendment Act, 1964, was repealed by The Registry Amendment Act, 1970.

Section 86 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, is as follows,

86.-(1) The council of any municipality may apply to a judge of the county or district court of the county or district in which is situate the whole, or any part not being less than one-half, of the lands included in any plan, and the judge has power to make orders and directions,

(a) for the hearing of the application upon such notice as the judge may direct;

(b) to cancel or suspend in whole or in part any registered plan;

(c) to close, divert or alter any or all highways, roads, streets or lanes shown on any such plan, either temporarily or permanently, or pending the suspension of the plan;

(d) to provide that the lands or any part or parts thereof shown on any such plan shall thereafter, or pending such suspension or until further order of the judge, be known and described by the original township or other registration numbers or designations used prior to the registration of any such plan, or such other numbers or descriptions as to the judge may seem convenient;

(e) to impose such terms and conditions as to the judge may seem proper;

(f) to fix and determine the fees and charges to be imposed and collected by registrars for all and any services under this section, and by whom the same shall be payable;

(g) to reinstate in whole or in part any plan suspended as aforesaid,

and the judge has power to make such further or other order, direction or disposition as he, in his discretion, may consider proper.

(2) Repealed, 1972, c. 133, s. 33.-(1).

(3) The Minister or any person affected by an order made under subsection 1 may appeal the order to the Supreme Court.

(4) An order under this section amending a plan that was approved under section 33 of THE PLANNING ACT or a predecessor thereof, where

> the plan was registered after the 27th day of March, 1946, shall not be made without the prior written consent of the Minister of Housing. 1972, c. 133, s. 33(2); 1973, c. 120.

Section 163 of THE LAND TITLES ACT, R.S.O. 1970, ch. 234, says,

> 163. Section 86 of THE REGISTRY ACT applies *mutatis mutandis* to land registered under this Act.

Section 87 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, says,

> 87. The registrar, the surveyor or any interested person may apply to a judge of a county or district court of the county, district or regional municipality in which the land included in a plan under section 89 or deposited reference plan is situate, and the judge has power to make orders and directions authorizing the registrar to correct any erroneous measurements upon, or any error, defect or omission in the plan upon production of evidence satisfactory to the judge, and either upon giving such notice to interested parties parties as he considers appropriate or *ex parte*. 1972, c. 133, s. 34.

Note the remarks made by Patterson, J.A., in *In Re Morton and the City of St. Thomas,* concerning the effect when the Registry Acts "assume to make registered plans binding", quoted at p. 93. *supra*.

PART 10 - ALLOWANCES FOR ROAD SHOWN ON PLANS OF SUBDIVISION

Section 57 of THE SURVEYS ACT, R.S.O. 1970, ch. 453, provides as follows,

57.-(1) Subject to THE LAND TITLES ACT or THE REGISTRY ACT as to the amendment of plans, every road allowance, highway, street, lane, walk and common shown on a plan of subdivision shall be deemed to be a public road, highway, street, lane, walk and common respectively.

(2) Where under subsection 1 a road allowance, highway, street, lane or walk in a municipality is a public highway but the municipality has not assumed it for public use and it or any part of it is closed by an alteration of the plan under THE LAND TITLES ACT, THE REGISTRY ACT or other provision in that behalf, it or the part of it so closed belongs to the owners of the land abutting thereon.

(3) Where several parcels of land having different owners abut on the road allowance, highway, street, lane or walk or the part thereof so closed, the owner of each parcel is entitled to the part so closed on which his land abuts to the middle line of the road allowance, highway, street, lane or walk or the part thereof so closed.

(4) Where a part of the road allowance, highway, street, lane or walk so closed is abutted on one side by another road allowance, highway, street, lane or walk or by a stream, river or other body of water, over which the public have rights of navigation or of floating timber, the whole width of such parts belongs to the owners whose lands abut thereon opposite the road allowance, highway, street, lane, walk, stream, river or other body of water.

(4*a*) Where a part of a road allowance, highway, street, lane or walk so closed does not include the whole width thereof, the whole width of such closed part belongs to the owners whose lands abut thereon.

(5) The division line between two parcels of land having different owners produced to the middle line of the road allowance, highway, street, lane or walk so closed or across the same in cases coming within subsections 4 or 4*a* is the division line between the parts so closed to which the owners of the parcels are respectively entitled.

(6) Where a parcel of land abutting a road allowance, highway, street, lane or walk so closed is owned by more than one person, each such owner is entitled to the like estate or interest in the part so closed as he has in the parcel abutting thereon.

(7) Where a parcel of land abutting a road allowance, highway, street, lane or walk so closed is encumbered, the encumbrance extends to and includes the part thereof to which the owner of such parcel becomes entitled under this section.

(8) Where a road allowance, highway, street, lane or walk is so closed, the municipality in which the same was vested shall execute a conveyance to each owner of the part that belongs to him under this section, and the municipality shall register the conveyance

> in the proper land registry office and shall bear the cost of preparing and registering it.

The first enactment, declaring that all allowances for roads, streets, or commons, surveyed and laid down on plans, should be public highways, streets and commons is to be found in The Surveys Act of 1849, 12 Vic. ch. 35, s. 41. [See p. 94, *supra*.] That section applied only to allowances for roads, streets or commons which had been surveyed in towns and villages and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for road, *etc.*, had been sold to purchasers.

The operation of 12 Vic. ch. 35, s. 41, was extended, first, in 1887 by 50 Vic. ch. 25, s. 62, to cities, and, secondly, in 1897, by 60 Vic. ch. 35, s. 20, to townships. The application of 12 Vic. ch. 35, s. 41, as amended, to townships is plainly retroactive, and has been so held: *McGregor v. Village of Watford (1906), 13 O.L.R. 10; Jones v. Township of Tuckersmith (1914), 33 O.L.R. 635.*

The word "lanes" was first added to the section in 1920 when The Surveys Act, R.S.O. 1914, ch. 166, was repealed by The Surveys Act, 1920, 10 & 11 Geo. V. ch. 48, subs. 2 of sec. 13 of which is as follows,

> 13(2) Subject to the provisions of The Registry Act and The Land Titles Act, as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof shall be public highways, streets, lanes and commons. [See now The Surveys Act, R.S.O. 1970, ch. 453, s. 57(1) *supra, at p.* 107.]

In *Roche v. Ryan (1892), 22 O.R. 107,* the combined effect of the Municipal and Survey Acts respecting public streets laid down on registered plans of subdivision and the jurisdiction and control exercised by the municipality over them was considered by McMahon, J., who said, at p. 117,

> By section 527 of the Municipal Act, R.S.O. 1887, ch. 184, every public street in a town shall be vested in the municipality. [See The Municipal Act, R.S.O. 1970, ch. 284, ss. 400 and 401, *infra,* at pp. 119 and 129, respectively.] When the plaintiff, in 1886, caused a survey to be made and lots laid out fronting on the streets mentioned, and a plan thereof registered, and he afterwards sold lots fronting on such streets to the defendants and to ..., the plaintiff constituted such streets public streets ...

In *Re Plan 69, Dunnville, [1950] O.R. 350,* the municipal corporation of the Town of Dunnville had applied to the County Court Judge of the County of Haldimand under s. 89 of The Registry Act, R.S.O. 1937, ch. 170, [See The Registry Act, R.S.O. 1970, ch. 409, s. 86, at p. 105, *supra*.] for an order closing part of a lane as laid out on Registered Plan No. 69 for the said Town. It was admitted that the municipal corporation had assumed the lane for public use. The County Court Judge held that she was without jurisdiction and made an order dismissing the application.

The following excerpts are from the judgment of Roach, J.A., beginning at p. 353,

Counsel for the appellants argued that there were two alternative methods of procedure open to the corporation: one, the procedure authorized by s. 89 [See The Registry Act, R.S.O. 1970, ch. 409, s. 86 at p. 105, *supra*.] of The Registry Act; the other, the procedure authorized by the relevant sections of The Municipal Act. In my opinion that cannot prevail.

After referring to the relevant sections of The Registry Act and The Municipal Act, Roach, J.A., continued as follows,

It would seem clear, at least where the objective of the applicant is the closing or altering of a highway, that s. 89 [now s. 86] of The Registry Act gives to the council of a municipality the same right to apply to a judge as is given under s. 88 [See p. 104, *supra*.] to the person filing the plan or to the owner of land covered thereby, but no greater right. In my opinion, however, neither those persons nor the council of the municipality may proceed under the relevant sections of The Registry Act in any case where the highway sought to be closed or altered has been adopted by the municipality for public use.

An owner of acreage may cause it to be subdivided and register the plan of subdivision. The streets laid out on that plan thereby become public highways, subject to the provisions of The Registry Act and The Land Titles Act, R.S.O. 1937, c. 174, as to the amendment or alteration of the plan: see s. 12(2) of The Surveys Act, R.S.O. 1937, c. 232. [See p. 113, *infra*.] The title to the land included in the highways laid out on the plan is vested in the municipal corporation even though the corporation does not adopt those highways for public use, subject to it being divested in the circumstances referred to in s. 12(4) of The Surveys Act. [See p. 113, *infra*.]

Until the municipal corporation has adopted those highways for public use those using them do so at their own risk. Indeed they may fall into such a state of non-repair as to become almost unusable.

How different is the situation where the corporation has adopted them as public highways. Thereafter it is required to keep them in a state of repair not only to the advantage of those whose lands abut on them but to the advantage of the public generally. If such a highway should be closed the question of compensation to those whose lands abut thereon may arise. In my opinion, it could not arise where the corporation had not adopted them for public use. In the first instance the corporation had nothing to do with those roads being laid out except to approve the plan, and until the corporation adopted them it owed no duty to the owners of abutting lands to keep those roads in a state of repair. The provisions of The Municipal Act provide for compensation, and declare that where there is a dispute concerning it, the amount thereof shall be fixed by arbitration. There is no provision in The Registry Act dealing with compensation, and absence of any such provision is one circumstance which leads me to the conclusion that the provisions of that Act dealing with the closing or altering of highways are not applicable to those cases where the question of compensation may arise.

Another reason why, in my opinion, ss. 88 and 89 of The Registry Act have no application to cases where the municipal corporation has assumed the highways sought to be closed relates to the right of the public to the user of those highways and the obligation of the municipal corporation to keep them in a state of repair. In such cases the Legislature wisely provided for notice to the public and specified the extent and nature of the notice by s. 498 of The Municipal Act. [See The Municipal Act, R.S.O. 1970, ch. 284, s. 446, at pp. 133 and 134, *infra*.] It did not intend to leave the matter of such notice to any-

one's discretion.

> The point in this case ... was referred to, but not decided in *Re Westwood Addition, Hamilton, [1945] O.R. 257, [1945] 2 D.L.R. 300.* ... [The reference was to *Roche v. Ryan.*]
>
> In *Roche v. Ryan,* Mr. Justice Street said: "It must also, I think, be taken to be law that when once a road laid out by an individual has been assumed as a public highway by a corporation, thereafter it can be closed and altered only by by-law of the corporation, and not by order of a Judge."
>
> There have been some changes in the statute law since the decision in *Roche v. Ryan,* but none that has altered the law as Mr. Justice Street, in the quotation which I have given, declared it then was. In my opinion, it is still the law .

Hope, J.A., agreed with Roach, J.A., that the learned County Court Judge was right in holding that she was without jurisdiction and that the appeal should be dismissed. Hogg, J.A., concurred but made some comments on several cases. The following is from his judgment at p. 357,

> In *Re City of Toronto Plan M.188 (1913), 28 O.L.R. 41, 11 D.L.R. 424,* an application was made under The Registry Act, 10 Edw. VII. c. 60, s. 85, or The Land Titles Act, 1 Geo. V. c. 28, s. 110, whichever might be applicable, to close a certain road shown on the plan in question. Section 85 of The Registry Act in force in 1910 was the same as s. 88 of the present Act [See p. 104, *supra.*] with certain exceptions which do not affect the point under consideration. Mr. Justice Middleton held that, in so far as a street which had been taken over by the municipality as a highway and assumed for public use was concerned, "the statutes had not application and that the street could be closed only by appropriate action on the part of the municipality."
>
> ... ...
>
> The principle ... to be gathered from *Re City of Toronto Plan M.188 (1913), 28 O.L.R. 41, 11 D.L.R. 105,* and *Re Jones and Township of Tuckersmith (1914), 5 O.W.N. 759, 25 O.W.R. 680* and *(1915), 33 O.L.R. 634, 23 D.L.R. 569,* is:
>
> 1. That if a road allowance [laid down on a plan of subdivision] has not been assumed by a municipality for public use, it may be closed only under the provisions of The Registry Act and The Surveys Act.
>
> 2. That if a road allowance [laid down on a plan of subdivision] has been assumed for public use by a municipality it can be closed only by by-law.

In *Re Hagen and City of Sault Ste. Marie, [1967] 1 O.R. 364,* the two lanes in question were laid out on a plan of subdivision registered in 1902. No public money had been expended on the lanes nor had the municipality done anything else which would constitute the assumption of them for public use as highways. The applicant, John Robert Hagen, the owner of certain lands according to the plan of subdivision, applied under section 91 of The Registry Act, R.S.O. 1960, c. 348, as amended by 1964, ch. 102, s. 24, for an order amending or altering the said plan by closing up the whole of one lane and a portion of the other lane. Notice of the application was not served on all of the persons entitled to receive notice and the hear-

ing was adjourned to permit counsel for the applicant to supplement his notice of application accordingly. The municipal council then enacted a by-law in great haste to assume all the lanes, including the two in question, in the subdivision for public use.

Vannini, D.C.J., found that,

> In passing the by-law Council was not acting in good faith. It passed it for the express purpose of defeating the applicant's *prima facie* right to the order he sought. And all of what was done by it to defeat the applicant's *prima facie* right was done in great haste and part of it was done behind his back. It hoped, eventually, to extract from him a considerable sum of money which he might not otherwise be required to pay. This was to say the least, "an improper motive" and a "sinister and collateral" purpose. As Hope, J.A., put it in *Boyd Builders Ltd. v. City of Ottawa, [1964] 2 O.R. 269 at p. 274, 45 D.L.R. (2d) 211 at p. 216:* "It is difficult to think of any stronger evidence of bad faith."

In the result, the by-law was declared to be invalid in respect of the lanes, or parts of the lanes, in question and the Court's discretion to grant the application was exercised in the applicant's favour.

In *Re Waldie and The Corporation of the Village of Burlington (1886), 13 O.A.R. 104,* a by-law to accept and open certain streets, and to accept an acre of land in the east end of Burlington, formerly Port Nelson, was quashed on the ground that it had been passed in defiance of and in opposition to an order made by the Judge of the County Court of the County of Halton on the 13th November, 1883, amending the registered plan on which the said streets were laid down by closing those portions of them which the council of the corporation thus afterwards attempted by by-law to accept and declare open.

Osler, J.A., said,

> Neither the mere marking out upon a plan, of spaces for roads and streets, nor the registration of such a plan, nor the sale of lots according to it, nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways.
>
> They may become so by any acts from which an irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality ....
>
> But until they do become so, section 84 (of the Registry Act) expressly provides that a plan, although filed, is not binding, and though sales may have been made under it, is only binding ... to the extent that the court or a judge may think proper not to permit a proposed amendment.
>
> So far as appears, the judge's jurisdiction was properly exercised, and no public street or highway was closed up or interfered with by the order.

In *Re Westwood Addition, Hamilton, [1945] 2 D.L.R. 300, [1945] O.R. 257,* a plan of subdivision showing allowances for streets thereon dedicated by the owner of the lands as public highways was registered. A strip of land 25 feet wide extends the full length of the westerly side of the subdivision where the subdivision is bounded by a street or lane already existing, and shown on the plan as Stroud Road. This strip, added to the existing street or lane, as appears to be the intention, gives Stroud Road the full

width of 66 feet, and it was adopted by the municipality for public use. All of the lots and one larger area shown as Parcel "A", together with such rights as the grantor then had in the streets shown on the plan, i.e., all of the lands subdivided by the plan, except the strip of land 25 feet wide that adjoined Stroud Road and became part of it, were conveyed to the applicants. There was no sale, other than this, of any of the lots shown on the plan, or of Parcel "A", and there was no encumbrance upon any of them. Neither had any of the streets, other than Stroud Road, been opened up or in any way adopted for public use by the municipality.

An application to alter or amend the plan was made under s. 88 of The Registry Act, R.S.O. 1937, c. 170 [See p. 104, *supra*.] and it was opposed by the Corporation of the City of Hamilton. The applicants asked that the whole plan be cancelled except that part forming part of Stroud Road. The application was dismissed for reasons which, counsel for the City of Hamilton conceded on appeal, could not be supported.

On appeal, Robertson, C.J.O., said, at p. 263 of the report in the Ontario Reports,

> It is not necessary, for the purposes of the present case, to determine where the ownership of the allowances for roads shown on such a plan as we have here lies, after the registration of the plan but before any sale is made according to the plan. Section 88(1) of The Registry Act says that a plan, although registered, shall not be binding upon the person registering the same, or upon any other persons, unless a sale has been made according to such plan, and it may well be that until such a sale is made the allowances for roads shown on the plan remain vested in the owner by whom the plan was registered. There has been here, however, a sale according to the plan. Reference to the plan is absolutely necessary to see what was sold to the applicants, and what was not sold to them. This plan must, therefore, I think be considered to be a plan that became binding on the owner and upon the applicants when the sale was made to the applicants, but subject to whatever amendments or alterations a judge might make, upon application to him. This is, I think, the result, by virtue of subs. 1 of s. 88 of The Registry Act. [See p. 104, *supra*.]

After referring to subsections 2 and 4 of section 12 of The Surveys Act, R.S.O. 1937, ch. 232 [See p. 113, *infra*.], the Chief Justice continued, at p. 264,

> Succeeding subsections make provision for dividing the road allowances among the different owners, where there are several parcels of land abutting on the allowance for road that is closed. Subs. 9 makes it the duty of the municipality in which the allowance for road was vested to execute a conveyance to each owner of that portion of the road allowance which belongs to him under this section, and the corporation is required to register such conveyance in the proper registry or land titles office. Subs. 10 provides that the cost of preparation and registering the conveyance shall be borne by the municipal corporation.
>
> Reading these provisions of The Surveys Act along with the provisions of The Municipal Act (ss. 453, 454 and 455) [See The Municipal Act, R.S.O. 1970, ch. 284, s. 399, at pp. 13, 19, 21, 27 and 39, *supra*, and ss. 400 and 401, at pp. 119 and 129, respectively.], it is in my opinion, their plain effect that the municipality is to be deemed the owner of the allowances for roads and streets laid down on the plan of subdivision, such as we have here to deal

with, whenever the plan has become binding upon the owner, and this regardless of the fact that the municipality may not have assumed the road or street for public use. The fact that the municipality is required to make a conveyance to the abutting owners when a road or street, or part of a road or street, has been closed by the alteration of the plan under The Registry Act or The Land Titles Act, is consistent only with that interpretation of the several statutory provisions that deal with the matter.

It was contended for the respondent [City of Hamilton] that once a road or street has become vested in the municipality, the provisions of s. 88 of The Registry Act [See p. 98, *supra*.] no longer apply, and that a road or street can be closed or altered in such case only by municipal by-law. It is to be noted, however, that the declaration made by subs. 2 of s. 12 of The Surveys Act is "Subject to the provisions of The Registry Act", while s. 453 of The Municipal Act begins with the words, "except in so far as they have been stopped up according to law." The difference in the wording of the exception in the two cases is to be accounted for by the fact that s. 453 of The Municipal Act [now s. 399] deals with several classes of allowances for roads and highways, as well as with such as are dedicated by the owners of land to the public use. Subs. 4 of s. 12 of The Surveys Act, *infra*, is also to be noted in this connection.

It may be - and upon this it is not necessary to express an opinion - that when a highway has been adopted by the municipality for public use, so that the municipality has become liable for keeping it in repair, the jurisdiction to close or alter it is vested solely in the municipality. Mr. Justice Street intimated an opinion of that kind in *Roche v. Ryan*, [(1892), 22 O.R. 107] *supra*, at the foot of p. 110. We have not to deal with that situation here. In my opinion, the plan in question became binding upon the owners and upon the applicants: the allowances for roads and streets shown upon the plan became vested in the municipality, but (except as to the strip adjoining Stroud Road) were not assumed by the municipality for public use: the County (Court) Judge had jurisdiction under s. 88 of The Registry Act to make an order amending or altering the plan, as the applicants asked, and the consent of the municipality was not essential to the making of such an order.

The appeal was allowed and the order of the County Court Judge was set aside and the matter was remitted to him to be dealt with on its merits.

Subsections 2 and 4 of section 12 of The Surveys Act, R.S.O. 1937, ch. 232, provided as follows,

12.-(2) Subject to the provisions of The Registry Act and The Land Titles Act, as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof shall be public highways, streets, lanes and commons.

(4) Where under subsection 2 an allowance for road, street or lane laid down upon a plan is a public highway but the municipal corporation has not assumed it for public use, and the allowance or any part thereof is closed by an alteration of the plan under The Registry Act, The Land Titles Act or any other provisions in that behalf, the allowance, or part thereof so closed shall belong to the owners of the land abutting thereon.

In *Boland v. Baker, [1953] 2 D.L.R. 455,* McRuer, C.J.H.C., said, at p. 460,

> There was a change in the Surveys Act in 1920, by 10-11 Geo. V., c. 48, when s-ss. (1), (2) and (4) of s. 13 (now s. 11) were enacted in the form in which they now appear. [See The Surveys Act, R.S.O. 1970, ch. 453, s. 57, *supra,* at p. 107.] This substantially altered the wording of s. 44 of (The Surveys Act) R.S.O. 1914, c. 166. Subsection (1) as it was in 1914 read as follows:
>
> "Subject to the provisions of The Registry Act, as to the amendment or alteration of plans, all allowances for roads, streets or commons surveyed in a city, town, village or township or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons."
>
> The words "have been or may be hereafter sold to purchasers" do not appear in the amendment of 1920 and the succeeding revisions of the statutes.

Essex Border Utilities Commission v. Labadie (1924), 26 O.W.N. 16, was decided after The Surveys Act, R.S.O. 1914, ch. 166 had been repealed and The Surveys Act, 1920 was in force. Wright J. found that the division line between original farm-lots 102 and 103 is as shown by a survey made for the plaintiffs shortly before the trial and that the plaintiffs' surveyors followed the methods prescribed by sec. 13 of The Surveys Act, 1920, 10 & 11 Geo. V. ch. 48. The following statement is found at p. 18 of the note,

> The plaintiffs contended that the registration of this plan [a registered plan of subdivision of part of farm-lot 103] amounted to a dedication of the land included in the portion marked "lane" as a public highway. The Surveys Act in force at the time this plan was registered was R.S.O. 1887, ch. 152. Even if the Surveys Act, R.S.O. 1914, ch. 166, sec. 44(1), has a retroactive effect and applies to the facts of this case, it does not assist the plaintiffs. The Word "streets" as used in sec. 44(1) does not include a lane: *Brett v. Toronto Railway Co. (1909), 13 O.W.R. 552, 14 O.W.R. 74.*
>
> *[NOTE: The Interpretation Act, R.S.O. 1970, ch. 225, sec. 7(1) says: "Every Act shall be judicially noticed by judges, justices of the peace and others without being specially pleaded."*

Oddly enough, sec. 13 of The Surveys Act, 1920 was noticed insofar as it prescribed the methods followed by the surveyors in preparing the plan of survey showing the division line between the farm-lots, but sec. 13(2), which added "lanes" to the description of allowances of land which shall vest in the municipalities having jurisdiction and control over them, subject to the provisions of The Registry Act and The Land Titles Act as to the amendment or alteration of plans, was not mentioned. If Wright, J., applied sec. 44(1) of The Surveys Act, R.S.O. 1914, ch. 166, in error, - it was certainly repealed and the new subsection was in force as of June 14th, 1920 - the error was not caught by the Second Divisional Court when the appeal was heard.

Section 13 (2) of The Surveys Act, 1920, 10 & 11 Geo. V. ch. 48, was applied in *University of Western Ontario v. Wilson et al., [1961] O.R. 69.* The case was heard by Donnelly, J., who referred to the case of *Essex Border Utilities Commission v. Labadie, supra,*

but did not offer an explanation why subsection 2 of section 13 of The Surveys Act, 1920, 10 & 11 Geo. V. ch. 48, was not applied. Concerning the case before him, Donnelly, J., said at p. 71 of the report,

> For the defendant it was contended that as the word "Township" was left out of the Surveys Act, as amended, that it did not apply to plans of subdivision in townships; also that in interpreting the relevant section the *ejusdem generis* rule should be applied. In *Brampton Jersey Enterprises Ltd. v. Milk Control Board of Ont., 1 D.L.R. (2d) 130 at p. 136, [1956] O.R. 1 at p. 10,* Hogg, J.A., held that this rule cannot be applied unless there is a genus. The words used in the section do not fall into a genus. The words "lot" and "on any parcel or tract of land or any part thereof" having been used in s. 13(2) I must hold that the Act applies to a plan of subdivision in a township.
>
> ... ...
>
> Section 13(2) of the Surveys Act, 1920 (Ont.), c. 48, provided that all allowances for roads, streets, lanes or commons which had been surveyed in any lot or parcel or tract of land or any part thereof and laid down on the plans thereof become public highways, streets, lanes and commons. The Registry Act, 1910 (Ont.), c. 60, s. 85, provided that a plan, although registered, did not become binding on the party registering the same or upon any other persons unless a sale had been made according to such a plan. A sale was made according to Plan 453 in 1907 and a sale according to Plan 454 was made in 1909. By virtue of the Surveys Act of 1920 the plans became binding on the parties who registered them and all allowances for roads, streets, lanes or commons laid down on such plans became public highways, streets, lanes or commons and the title of the land included in such highways, streets, lanes or commons vested in the municipal corporation even though it did not adopt them for general use. It follows that lanes referred to in the statement of claim and shown on Plans 453 and 454 for the Township of London are public lanes.

In *Re Alfrey Investments Ltd. and Shefsky Developments Ltd. et al. (1974), 6 O.R. (2d) 321,* it was contended by the purchaser in a Vendors and Purchasers application that a certain lane shown on a plan registered in 1875 is a public lane and owned by the Municipality of Ottawa or, in the alternative, that it is still owned by the person who registered the plan or his heirs, etc. The City of Ottawa disclaimed any right, title or interest in the lane.

Learner, J., pointed out that the word "lanes" appears for the first time in sec. 13(2) of The Surveys Act, 1920 (Ont.), c. 48, and that thereafter they become public.

Concerning the appeal in *Essex Border Utilities Commission v. Labadie (1924), 26 O.W.N. 356 (C.A.),* Lerner, J., observed,

> There was no comment by the Court in that appeal on the effect of the 1920 amendment to the Surveys Act as to whether the 1920 amendment was or would be retroactive to effect a plan put on prior to 1920 (as in this case registered in 1875) when "lanes" were not included in the existing Act at that time or any amendment down to 1920 when "lanes" were first included.

Lerner, J., then discussed the judgment of Donnelly, J., in *University of Western Ontario v. Wilson et al., [1961] O.R. 69,* and,

beginning at p. 330, he says,

> Mr. Justice Donnelly did not distinguish the *Essex* case or discuss the problem whether the 1920 Act was retroactive and applied to the plan registered in 1907. Rather, the decision seems to have been based on whether there had been a sale of any of the lots, which in fact he found had occurred and that as a consequence thereof the registered plan of a subdivision became binding on the owner once a sale had been made in accordance with the plan.
>
> It is a fundamental rule that statutes are presumed to be intended to apply to future acts and conditions and, therefore, a statute, other than dealing with procedure, will not be held to operate retrospectively unless a clear intention that it should do so is manifested by express words or by necessary and distinct implication: 19 C.E.D. (Ont. 2nd), p. 560.
>
> ... ...
>
> ... the addition of "lanes" to the description of allowances of land which shall fall within the jurisdiction of the particular municipality for the benefit of the public is a substantive change in the legislation and not procedural.
>
> The Interpretation Act, R.S.O. 1970, c. 225, s. 14, states:
>
> 14(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,
>
> (b) affect the previous operation of any Act, regulation or thing so repealed or revoked;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;
>
> A statute is not to operate retrospectively unless the statute expressly provides for a retrospective operation or such an interpretation is implied by necessary implication: *Re Curran and Curran v. Wood et al., [1954] O.W.N. 185, [1954] 1 D.L.R. 462; Re Mercier and Mercier v. McCammon, [1953] O.R. 698, [1953] 4 D.L.R. 498.* The intention to make a statute retrospective must appear from the words of the statute itself.
>
> ... ...
>
> ... I find that the ... City of Ottawa (added as a party respondent) has no right, title or interest in the lane designated on the plan dated June 15, 1875, ... I also find that the applicant has possessory title to the south half of the said lane subject to a right of way in favour of the owners and occupiers of the abutting lands and all persons having lawful ingress to those abutting lands and that, therefore, the objection to title made by the respondent purchaser is not a valid objection. ...

EFFECT OF MORTGAGEE'S CONSENT TO A PLAN OF SUBDIVISION

Subsection 4 of section 78 of The Registry Act provides as follows,

> (4) The consent of the mortgagee to a plan of subdivision, when registered, discharges from the mortgage any land dedicated by the owner as a public highway and any land designated as a re-reserve that is conveyed to the corporation of the municipality in which the land is situate.

WHAT ARE DEEMED TO BE STREETS OR HIGHWAYS ON REGISTERED PLANS OF SUBDIVISION

Subsection 5 of section 78 of The Registry Act provides as follows,

> (5) Any public or private street, way, lane, or alley, or block, tract or lot, being the only access to a lot or lots laid down on a plan of subdivision, shall be deemed to be a street or highway.

Subsection 5 would appear to codify the common law respecting easements acquired by purchasers of lots or blocks according to a plan or map. It does not purport to make private ways into public ways. Public streets, etc., being streets or highways, it seems pointless to deem them to be that which they are.

PART 11 - THE SOIL AND FREEHOLD IN HIGHWAYS

VESTING

Section 400 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, is as follows,

> 400.-(1) Unless otherwise expressly provided, the soil and freehold of every highway is vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under this or any other Act.
>
> (2) In the case of a dedicated highway, such vesting is subject to any rights in the soil reserved by the person who laid out or dedicated the highway.

The Corporation of the Town of Sarnia v. The Great Western Railway Company (1861), 21 Q.B. 59, was an action of ejectment for parts of Wellington and Nelson streets, in the town of Sarnia.

A tract of land comprising the streets in question was surveyed in 1852 under the direction of the government. The plan of survey was registered by the Commissioner of Crown Lands in the Registry Office for the County of Lambton in 1854. Lots fronting on the said streets were sold in 1853 and 1854 under government instructions and patents were issued. Public money was expended in ditching the streets. The Town of Sarnia was incorporated by an Act passed on the 19th of June, 1856, and the streets were included within the corporation limits. The company was in possession of parts of the streets crossed by the railway and had enclosed the premises claimed with a picket fence. A demand of possession was made before the action was brought.

Draper, C.J., nonsuited the plaintiffs on the ground that the facts stated would not entitle the plaintiffs to recover, for that the freehold of the streets, assuming them to be public highways, was in the Crown.

> [The relevant sections of The Municipal Institutions Act, C.S.U.C. 1859, 22 Vic. ch. 54, were the following,
>
> 314. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out, according to law, shall be vested in Her Majesty, Her Heirs and Successors.
>
> 315. Subject to the exceptions and provisions hereinafter contained, every Municipal Council shall have jurisdiction over the original allowances for Roads, Highways and Bridges within the municipality.
>
> 336. Every public road, street, bridge or other highway, in a City, Township, Town or Incorporated Village, shall be vested in the Municipality, subject to any rights in the soil which the individuals who laid out such road, street, bridge or highway, reserved, and except any concession or other road within the City, Township or Town or Incorporated Village, taken and held possession of by an individual in lieu of a street, road or highway, laid out by him without compensation therefor.]

The plaintiffs obtained a rule to shew cause why the nonsuit should not be set aside and the defendant shewed cause.

The following are excerpts from the judgment of McLean, J., beginning at p. 61.

> The 314th section of ch. 54 of the Consolidated Statutes of

> Upper Canada is, as it appears to me, the only provision by which the soil and freehold of any highway or road is declared to be vested in the Crown. The previous section declares, what shall constitute highways, and that section declares, that unless otherwise provided for, the soil and freehold of every highway or road altered, amended, or laid out, according to law, shall be vested in her Majesty, her heirs and successors. It may be difficult to say to what particular class of roads that provision was intended to extend - not to all roads or highways, for if that had been the intention nothing could have been easier than to have said so in so many words: it only refers to highways or roads altered, amended, or laid out, according to law.
>
> In case of such roads it may have been considered advisable to vest the soil and freehold of new and substituted roads in her Majesty, unless some other provision were made in that respect. A person dedicating a parcel of land as a public road would still retain the freehold, unless some provision were made by which it would pass to the municipality. In that case it would vest in the Crown under the 314th section.
>
> But the 336th section certainly makes other provisions with respect to highways and roads generally. It declares that every public road, street, bridge, or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which any individuals who may have laid out such road, street, bridge, or highway, reserved, and except any concession or other road within the city, township, town, or incorporated village, taken and held possession of by any individual in lieu of a street, road or highway, laid out by him without compensation therefor.
>
> That section, I think, does vest in the municipalities the several streets and roads within their border, except as specified in the two cases mentioned, but it does not necessarily follow that it conveys such a freehold estate as will entitle a municipality to maintain ejectment. Every individual in the community has an equal right to a public street or road, and the municipalities cannot be considered as proprietors, and so entitled to control the possession, any more than any other corporation or person interested in the streets or highways. The property vested in the municipality is a qualified property, to be held and exercised for the benefit of the whole body of the corporation. They have a right to open streets where they may be necessary for the public convenience, or to shut up streets not required, and they may take a grant of land in the name of the corporation, or may convey the soil and freehold of a street which is closed up. They so far may be said to hold the freehold, but then it is only as trustee for the public, and not by virtue of any title which confers a right of exclusive possession.

It was held that the plaintiffs' action was improperly framed. Ejectment was not the proper remedy and the nonsuit was right.

In *Roche v. Ryan (1892), 22 O.R. 107*, the plaintiff was the owner of a tract of land within the town of Smith's Falls. In 1886, he had it subdivided into small lots and ran streets through it, and registered his plan. Upon this plan two streets, called John street and Herbert street, are laid down as intersecting one another.

On 27th August, 1890, the plaintiff sold to the defendant lot number 7 on Herbert street, that lot being at the intersection of of these streets. On 2nd September, 1890, he sold to the defendant

lot number 15 on Herbert street, also at the intersection of these streets; and on 6th September, 1890, he sold to one Munroe lots 23 and 24 at the corner of the same streets. Conveyances were made at the dates above mentioned and registered shortly afterwards. Notwithstanding these sales, the whole tract surveyed continued to be fenced and enclosed, and to be used as a pasture field until the spring of 1891. Before making his survey the plaintiff applied to the council of the town for leave to lay out his streets of a width of forty feet, but leave was refused.

In March, 1889, Mr. Cromwell, P.L.S., under instructions from the town council, prepared a plan of the whole of the property comprised within the corporation limits, and this plan, signed by the mayor and sealed with the corporate seal, was registered in June, 1890. It embodied the survey made by the plaintiff, and shewed the lots and streets laid out by him of the property in question. In September and October, 1890, the defendant took from the land, shewn as John and Herbert streets, and from the lots he had purchased from the plaintiff, a quantity of building stone; and the action was brought to recover the value of the portion of it taken from the streets.

... The defendant denied the plaintiff's right to recover, setting up that the property in the streets was in the corporation, whose leave he alleged to have obtained. He shewed that he had had conversations with two out of three street commissioners: that these two came up to the ground at his request and authorized him to take the stone, provided he made the street passable afterwards. The third street commissioner was not consulted upon the matter, nor was he notified to attend, and the leave given was verbal.

On 20th October, 1890, after all the stone sued for had been taken, the defendant applied to the council for leave, and a resolution was passed referring it to the street commissioners to open up these streets if they should think proper. No meeting of the commissioners is shewn to have taken place; but on 5th February, 1891, an agreement was entered into between the corporation and the defendant, whereby he agreed to grade and level these streets in consideration of the corporation granting him the stone which he should excavate in the course of his work. The streets were afterwards graded and levelled by him to the satisfaction of the corporation.

Street, J., the trial Judge, after setting out the facts as above stated, said, beginning at p. 109,

> The statutes bearing upon the law relating to streets laid out by private individuals have given rise to many questions which it is not always an easy matter to answer.
>
> Under sec. 65 of [the Surveys Act] R.S.O. [1887] ch. 152, a plan of subdivision is not binding upon the owner although it be registered, until sales have been made under it, and even then streets laid out upon it may be altered by order of a judge upon notice to all parties concerned.
>
> By section 62 of the same Act [the Surveys Act] it is declared that all allowances for streets laid out by individuals, and upon which lots have been sold, shall be public highways; provided that the municipality shall not be bound to keep such

streets in repair until they have been established by by-law, or otherwise assumed for public use by the corporation.

By section 525 of [the Municipal Act] R.S.O. [1887] ch. 184, "Unless otherwise provided for, the soil and freehold of any highway or road altered, amended or laid out according to law, shall be vested in Her Majesty."

By section 527 of the same Act, [the Municipal Act] "every public road, street, bridge or other highway ... shall be vested in the municipality: subject to any rights in the soil which the individuals who laid out such roads, ... reserved."

By section 531, sub-section 1 [of the Municipal Act] the corporation is required to keep in repair all roads and highways in its jurisdiction in repair; and by sub-section 2 this provision is declared not to apply to any road, street, or highway laid out by any private person until established by by-law or otherwise assumed for public user by the corporation.

By section 550 of the same Act [the Municipal Act] power is given to the corporation to close up, alter, *etc.*, streets, roads and highways within its jurisdiction.

Of the conflicting views which have been taken of the effect and meaning of sections 525 and 527 [of the Municipal Act] I prefer that which interprets section 527 as relating only to roads and streets laid out by private individuals, and treat it as vesting not the surface merely but also the soil and freehold in the municipality. Its language is wide enough to cover the soil and freehold, as well as the surface, and [paraphrasing] were it not intended that section 527 should have the effect (in the absence of a reservation) of depriving the individuals who laid out the streets of all rights and vesting in the municipality the soil and freehold of the streets, as well as the surface, there would have been no need to include the words "subject to any rights in the soil which the individuals who laid out such road ... reserved."

Then by section 565 [of the Municipal Act] the corporation are authorized to sell the minerals found under any public highway, and this power, although perhaps not inconsistent with the view that the Crown is owner of the freehold, is entirely inconsistent with the idea of a continued private ownership of it.

The question is thus, I think, narrowed to one between the ownership of the Crown and that of the municipality, when once it has passed from the private owner; and in the present case, if the right has passed out of the plaintiff, it is immaterial whether it has become vested in the Crown or the municipality, for in either case he could not recover.

It is argued for the defendant that the plaintiff's ownership ceased when he had sold lots fronting on the streets which he laid out through his land, because then, under sec. 62 of [the Surveys Act] R.S.O. [1887] ch. 152, the streets became public highways. It is argued for the plaintiff that his ownership of the streets continued at all events until the corporation had assumed jurisdiction over the streets, and that they did not do this until after the 20th October, 1890, when all the stone in question had already been taken.

Assuming the law to be that at some particular period of the dedication to the public, the freehold passed out of the

plaintiff and became vested in the corporation, I think it must be taken that having become so vested it remained vested, and was not subject to be divested again and revested in the owner without the consent of the corporation. [Street, J., was held to be in error in this view of the law.] It must also, I think, be taken to be law that when once a road laid out by an individual has been assumed as a public highway by a corporation, thereafter it can be closed and altered only by a by-law of the corporation and not by order of a judge. [This is a correct statement of the law.] There appears to be an intermediate stage between the act of selling a lot fronting on one of his streets by a proprietor, and the assumption by the corporation of the street as a public highway, during which, with the consent of the purchaser of the lot and by order of a judge, the proprietor may close up the street and terminate the intended dedication, and it is difficult to conceive that during this stage the ownership can be otherwise than in the original proprietor. See *O'Brien v. Village of Trenton, 6 C.P. 350, 7 C.P. 246; Re Morton and Corporation of St. Thomas, 6 A.R. 323, at pp. 333-4.*

My conclusion therefore is, that until the corporation have assumed as a public highway, which they are bound to keep in repair, a road laid out by an individual - so long in fact as they have not accepted the dedication offered to them - that proposed dedication is revocable, and the property in the streets remains in the individual. [This conclusion is incorrect.]

The defendant moved on notice to have the judgment of Mr. Justice Street set aside.

In the Divisional Court, Galt, C.J., said, at p. 114 of the report,

The learned Judge has given a most carefully considered judgment, and refers to the different sections of the Municipal and Land Surveyors' Acts bearing on this question. After fully going into the question, he arrives at the following conclusion: "My conclusion, therefore, is, that until the corporation have assumed as a public highway, which they are bound to keep in repair, a road laid out by an individual,- so long, in fact, as they have not accepted the dedication offered to them - that proposed dedication is revocable, and the property in the streets remains in the individual."

It is upon this question, and this only, that this case depends.

By section 62, of the Land Surveyors' Act, R.S.O. [1887] ch. 152, "All allowances for roads, streets or commons, surveyed in cities, towns and villages, or any part thereof, which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, shall be public highways, streets and commons."

This enactment appears to me to be positive.

By sec. 527, of the Municipal Act, R.S.O. [1887] ch. 184, "Every public road, street, bridge or other highway, in a city, township, town or incorporated village, shall be vested in the municipality."

It appears to me that this enactment was necessary for this reason:- in cases where persons sell lands adjoining on a highway, either shewn on a plan or described in a deed, would transfer the moiety of such street to the person in whose favour the deed had been executed.

This is clearly laid down in the case of *Berridge v. Ward, 10*

C.B.N.S. p. 400, in which the law is summed up by Williams, J., as follows, at p. 416: "The general rule ... I take to be this,- that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land. There is nothing in the present case to take it out of the general rule."

And in the same case, Erle, C.J., in his judgment, at p. 415, states that "Where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance."

In the present case there had been several sales, as stated by the learned Judge, two of them to this defendant.

In my opinion, therefore, with great respect for the decision of the learned Judge, I am unable to arrive at the same conclusion. I consider that when lots have been sold abutting on a street, the property in that street is absolutely vested in the corporation, unless a change in the plan should be made with the consent of the persons to whom the various lots have been sold.

... ...

It is ... manifest that whatever may have been the right of adjoining owners, or of the original proprietor, under the common law, they are settled by the positive provision already referred to in the Municipal Act, sec. 527, viz.: "Every public road, street, bridge or other highway, in a city, township, town or incorporated village, shall be vested in the municipality, subject to any rights in the soil which may have been reserved." In the present case no rights had been reserved, consequently the streets vested absolutely in the municipality.

In the case of *Re Trent Valley Canal (1886), 11 O.R. 687,* certain lands were required and had been expropriated by the Dominion Government for the purposes of construction of the Trent Valley Canal, and as the title to some of them was not clear the compensation money was paid into court ...

Boyd, C., said, beginning at p. 694,

Water street being, as I have found it, a public highway, the only matter which remains is to determine as to the ownership of the soil and freehold of that highway. Whatever may have been the position in this regard prior to 1858, the statute of that year in secs. 301 and 302 provides for all possible highways, and this must fall under one or the other section. These sections are continued as sections 525 and 527 of the Municipal Act of 1883, and though many judicial opinions have been expressed upon their scope and effect, I think that a satisfacory solution of their meaning has yet to be pronounced by an Appellate Court.

The intermediate history of these sections is this: After 1858 they appear in the Consolidated Statutes of U.C., 1859, [See p. 119, *supra.*] as secs. 314 and 336: the former under the heading "Highways vested in the Crown;" the latter under the heading "Highways in cities, townships, towns, and incorporated villages." They next appeared in the Canada Act of 1866, 29, 30 Vic., cap. 51, as secs. 316 and 338, under like heads.

After Confederation there is a striking change in the manner of their first appearance in the Ontario Statutes of 1873: 36 Vic., cap. 48. Sec. 405, corresponding to sec. 316 of the Act of 1866, is headed

"Freehold in the Crown"; and sec. 407, corresponding to sec. 338 of the Act of 1866, is headed "Possession in Municipality." From this they are carried into the Revised Statutes of Ontario of 1877, as secs. 487 and 489 of cap. 174, under the same heads as in 36 Vic. cap. 48; and under the same heads they are found in the last Municipal Act of 1883, as I have already cited them.

With respect to the decisions of the Courts, the later opinion appears to be that sec. 527 (i.e. 336 of C.S.U.C., cap. 54) is restricted to streets in municipalities originally dedicated to the public by or derived for value from private proprietors, and as to these the soil is vested in the municipality and not in the Crown. That I understand to be the effect of *Mytton v. Duck, 26 U.C.R. 61 (1866)*, a decision which adopts and approves of the view expressed to the same effect by Burns, J., in *The Corporation of the Town of Sarnia v. Great Western R.W. Co., 21 U.C.R. 64 (1861)*. McLean, J., had a somewhat different opinion, holding that the property vested in the municipality was qualified, and not a freehold in its largest sense. In *Kronsbien v. Gage, 10 Gr. 573 (1864)* Vankoughnet, C., suggested a solution of the difficulty by holding that the freehold may be in the Crown quite consistently with the road being vested in the municipality, which was charged with the custody and repair of it. A very persuasive argument in favour of this being the true view may be derived from the manner in which these sections have been classified and entitled by the Ontario Legislature. It is to be observed, also, that the latter section does not speak of the soil and freehold being vested in the municipality, but only that the road, street or other highways shall be so vested. This is language commonly used in English statutes, and its meaning is exhausted by confining it to the surface, and to such depth thereunder as may be required for the purposes of the particular street, according to its location and the requirements of the inhabitants. The latest judgment on this point is that of Field, J., in *Gaslight & Coke Co. v. Vestry of St. Mary's, &c., 1 Ca. & Ell. 368*, which was affirmed in appeal, *15 Q.B.D. 1*, and it is based upon *Corrodale v. Charlton, 4 Q.B.D. 104*. Unless the soil and freehold of the street be vested in the village of Fenelon Falls, I find no authority for awarding them any compensation in respect of the public easement as a highway being destroyed by expropriation of the land. Each individual whose property is specially injured may recover damages, but probably not a corporation in whom is vested a roadway for the general use of the public. No land belonging to the municipal corporation is taken, and the injury to the easement is not one in which the corporation as such is pecuniarily interested. No means are available for ascertaining the extent of damage to the public who use the street, which might be recoverable by the corporation as trustees for the public. Upon questions germane to this: *Ross v. The Vestry of St. George, &c., 14 Ch. D. 785*, may be profitably consulted.

But in the view I take of this case it is not needful to pursue this inquiry further. Originally it may be that the soil and freehold of this street remained in the private owner, subject to the public easement, but since 1858, at all events, I am compelled to think that it became vested in Her Majesty by virtue of 22 Vic. cap. 99, sec. 301. I have not fully investigated whether there was not some earlier enactment to a like effect, but this section appears to me to embrace the present case. Under 4 & 5 Vic. no provision is made for compensation to the owner, and it is not to be inferred that compensation was actually made to him. He was a witness and was not asked to say anything upon the point.

> This street was not, upon all the evidence, one laid out directly or inferentially by the individual proprietor so as to make sec. 322 of the Municipal Act of 1858 applicable. On the other hand, it is within the definition of a highway given in sec. 300, as being a road "laid out by virtue of an Act of Parliament of Upper Canada," and there being no other provisions as to the freehold, it is within section 301 as being a highway "laid out according to law."
>
> I suppose therefore, that this road is vested in the Crown as representing the Province of Ontario, and that the Attorney-General should be added as a party in order to give protection to the Dominion in expropriating this particular piece of land. ...

The Attorney-General of Ontario was subsequently made a party, and the matter was re-argued ... Boyd, C., continued at p. 698 as follows,

> The additional evidence which I directed to be furnished now makes it plain as a matter of fact that no compensation was paid to the owner upon the expropriation of the land mentioned in the by-law. He made no claim therefor, but intended to relinquish all interest therein and in the land as a gift to the village. This goes to confirm my previous opinion that the soil of the roads is vested in the Crown, represented by the Attorney-General of Ontario. To him as a public officer is the compensation payable, and even if I had the jurisdiction I do not think I should interfere with his discretion, or rather that of the Lieutenant-Governor in Council, as to the ultimate disposition of this fund.
>
> It appears to me that the cannon of construction ... that private rights are not to be considered as interfered with by statutes apparently affecting these rights unless compensation is given to the individual proprietors, is not of much force in this case. The material injury arose when the land was first taken in 1842 for the purposes of the highway: it was a comparatively minor matter after that was done to declare in 1858 that the soil of the street should be vested in the Crown. The land under the highway is of no value to the original owner and instead of conserving individual titles, it may well be deemed better for all purposes to have the titles to such land in a uniform condition of tenure, which can only be secured by vesting all in the Crown. When no longer needed for public use, the infallible justice of the Crown will regard the rights of all interested, whether individuals who have received no compensation for land once theirs, or corporations who have spent public money in the construction and maintenance of the road. In *unique* cases such as this, where the individual has intended to make a present to the corporation, and the latter has made no expenditure on the street, the Crown can as well as the Court administer the money which represents the land and street, so as to do justice in the premises.

In *Jones v. Township of Tuckersmith (1917), 45 O.L.R. 67,* Mr. Justice Idington of the Supreme Court of Canada said, at p. 71,

> I need not elaborate now, but state and refer those conversant with the Municipal Act to it provisions, from which it will appear that the words "within the jurisdiction of the council" refer not to any merely territorial jurisdiction, but to the actual jurisdiction conferred by the Act and what has been done pursuant thereto. Every road is, territorially speaking, within the county, but not within its jurisdiction, in the language I quote. Hence

we must look to what has by the course of events fallen within its jurisdiction over any road.

Even assuming for a moment, which I do not, that the "public road," etc., referred to in sec. 601 of the Municipal Act, 1903, vested in the municipality, it certainly cannot be said to have jurisdiction over it as a street simply by an act of the Legislature vesting the legal estate of the soil in it, when, as the enactment presumes, a road has been duly constituted a public highway, unless and until it has assumed its jurisdiction over it as a street.

The municipality, for example, generally has its town-hall vested in it as a property, and often other property; but that would not enable it to sell the same under the above provision relative to the jurisdiction to sell a street.

It is not the soil of all the public highways within its border which a municipality can have vested in it, but those only to which it has assented to being so vested.

It is elementary law that no real estate can vest in any one against his will and without his assent, unless incidentally to some statutory obligation. It is equally elementary that when a statute has imposed a duty upon any one in relation to real estate and declared that it shall for that purpose or in any event vest in him, it does so vest by operation of law."

In *Abell v. Village of Woodbridge and County of York (1918), 45 O.L.R. 79, [Appellate Division]* the judgment of Masten, J., the trial Judge, was reversed. Meredith, C.J.O., who wrote the majority judgment, said, at p. 81,

It was held by a Divisional Court in *Roche v. Ryan, 22 O.R. 107*, that the effect of sec. 527 of [the Municipal Act] R.S.O. 1887, ch. 184, was to vest not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the road, street, bridge or highway and that case was followed in *Cotton v. City of Vancouver (1906), 12 B.C.R. 497*.

An important change was made in the law by the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43. It provided by sec. 433, that the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act," and by sec. 432, "all roads dedicated by the owner of the land to the public use" are declared to "be common and public highways."

I see no escape from the conclusion that the effect of this legislation and the repeal of 3 Edw. VII. ch. 19, which was concurrent with it, is to remove the qualification to which under that Act the vesting of the highways was subject, and to vest, absolutely and without qualification, the soil and freehold of them in the municipal corporation; ..."

Middleton, J., who wrote the dissenting judgment, had this to say, at p. 83,

It is well settled law that where there is a dedication by the owner of lands the public must accept the dedication in the terms in which it is given. The owner is under no obligation to dedicate, and he can dedicate subject to such terms and reservations as he chooses to impose, and if the public accept the use of the highway it is accepted subject to the terms and conditions imposed, and there is no injustice in holding them to the terms

on which the benefit was conferred. If authority is needed for this, see *Cooper v. Walker (1862), 2 B. & S. 773.* I do not understand that my Lord in any way differs from this view of the law.

Until the statute of 1913, there were found provisions in the Municipal Act with reference to the title to highways which were regarded as difficult of interpretation, and in some sense conflicting. These provisions entirely differ from the common law, under which the public merely had the right to pass and repass along the way, the soil remaining the property of the freeholders dedicating, the presumption being that the adjoining owners were entitled *"ad medium filum."* The nature of the statutory provisions and the theories put forward as to their effect, may be gathered from *Roche v. Ryan, 22 O.R. 107,* and from Mr. Biggar's annotations on secs. 599, 600, and 601 of the Municipal Act, R.S.O. 1897, ch. 223: Municipal Manual (1900).

In the revisions of 1913, an attempt was made to get rid of all these difficulties, and to declare that the title to all highways should be vested in the municipality. This undoubtedly had the effect of vesting in the municipality the title to roads that theretofore had been vested in His Majesty. I cannot think that it was the intention of the Legislature otherwise to interfere with existing rights or in any way to enlarge the effect of any dedication of the highway.

Section 413 of the Municipal Act, R.S.O. 1914, ch. 192, was amended by 9 Geo. V. ch. 46, s. 20, by adding thereto the following subsection,

413.-(2) In the case of a dedicated highway such vesting shall be subject to any rights in the soil reserved by the person who laid out or dedicated the highway.

Subsequent to the enactment of subsection 2 of section 413, the Supreme Court of Canada, in *Abell v. The Corporation of the County of York (1920), 61 S.C.R. 345,* agreed with the judgment of Mr. Justice Middleton and restored the judgment of the trial judge.

NOTE: See THE INTERPETATION ACT, R.S.O. 1970, ch. 225, s. 14(1)(b) and (c) at pp. 171-2, *Infra.*

PART 12 - JURISDICTION OVER HIGHWAYS

JURISDICTION OF MUNICIPAL COUNCILS

Section 401 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, is as follows,

401. Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality has jurisdiction over all highways and bridges within the municipality.

Section 443 of THE MUNICIPAL ACT is as follows,

443.-(1) The council of every municipality may pass by-laws,

(a) for establishing and laying out highways;

(b) for widening, altering or diverting any highway or part of a highway;

(c) for stopping up any highway or part of a highway or for stopping up any highway or part of a highway for a specified period or periods of time;

(d) for leasing or selling the soil and freehold of a stopped up highway or part of a highway;

(e) for setting apart and laying out such parts as may be considered expedient of any highway for the purpose of carriage ways, boulevards and sidewalks, and for beautifying the same, and making regulations for their protection;

(f) for permitting subways for cattle under and bridges for cattle over any highway;

(g) for acquiring land or an interest in land at street intersections for the purpose of rounding corners.

(2) Nothing in subsection 1 authorizes a council to interfere with any public road or bridge vested in the Crown in right of Ontario or in any ministry, board or officer of Ontario.

(3) A by-law passed under clause *b* of subsection 1 for altering or diverting any highway or part of a highway or under clause *c* or *d* of subsection 1 in respect of an allowance for road reserved in the original survey,

(a) along the bank of any river, stream or other water;

(b) along or on the shore of any lake or other water;

(c) leading to the bank of any river or stream; or

(d) leading to the shore of any lake or other water,

does not take effect until it has been approved by the Minister, and, where the by-law also requires approval of a judge or confirmation by a county council under subsection 6, it shall not be submitted to the Minister until such approval or confirmation has been obtained, provided that the approval of the Minister is

not required for a by-law for leasing a stopped-up highway or part of a highway to an owner of land that abuts on it for a period not in excess of thirty years.

(4) The powers conferred by subsection 1 shall not be exercised without the consent of the Governor General in Council in respect of,

(a) any street, lane or thoroughfare made or laid out by Her Majesty's Ordinance [Ordnance] or the Principal Secretary of State in whom the Ordinance [Ordnance] estates became vested under the Act of the late Province of Canada passed in the 19th year of the reign of Her late Majesty Queen Victoria, Chapter 45, or under Chapter 24 of the Consolidated Statutes of Canada, or made or laid out by the Government of Canada;

(b) any land owned by the Crown in right of Canada;

(c) any bridge, wharf, dock, quay or other work vested in the Crown in right of Canada,

or so as to interfere with any land reserved for military purposes or with the integrity of the public defences, and the consent of the Governor General in Council shall be recited in the by-law, but the by-law shall not be quashed or open to question because of the omission to recite it if the consent has been in fact given.

(5) The powers conferred by clause *c* of subsection 1 shall not be exercised by the council of a county in respect of a highway or part of a highway within the limits of a city, town or village in or adjoining the county.

(6) A by-law of the council of a township passed under clause *c* of subsection 1,

(a) in the case of a township in unorganized territory, does not have any force until approved by a judge of the district court of the district in which the township is situated;

(b) in the case of a township separated for municipal purposes from the county in which it is situated, does not have any force until approved by a judge of the county court of the county in which the township is situated; and

(c) in the case of other townships, does not have any force until confirmed by a by-law of the council of the county in which the township is situated passed at an ordinary meeting of the council held not later than one year after the passing of the by-law by the council of the township.

(7) The council may in any by-law closing a highway provide that the same shall only be closed for vehicular traffic and not for pedestrian traffic or *vice versa*, and may provide for the erection of barricades to enforce the due observance thereof.

(8) A by-law passed under clause *b* of subsection 1 in respect of altering or diverting any highway or part of a highway or under clause *c* of subsection 1 does not take effect in respect

of any highway or part of a highway shown on a registered plan of subdivision registered after the 27th day of March, 1946, until it has been approved by the Minister.

(9) A by-law passed under subsection 1, or any predecessor of subsection 1, for closing any street, road or highway or for opening upon any private property any street, road or highway does not take effect until it has been registered in the registry office of the registry division in which the land is situate, and the by-law shall be registered without further proof by depositing a copy certified under the hand of the clerk and the seal of the municipality.

POLICE VILLAGES

An unincorporated police village is not ... an independant organization but merely an area within the township, possessing only the special attributes, powers and obligations which are specifically conferred or imposed upon it by the Municipal Act, and none of these, either directly or by implication, impose a duty of maintaining its sidewalks in repair: *Brooks v. Whyte et al., [1934] O.R. 55.*

THE TERRITORIAL DIVISIONS OF ONTARIO

THE TERRITORIAL DIVISION ACT, R.S.O. 1970, ch. 458, sets forth divisions, i.e., counties, districts and metropolitan and regional areas, into which the Province has been divided, the composition of each of them and whether the division is for municipal and judicial purposes or for judicial purposes only.

Briefly, the counties of southern Ontario, including the Provisional County of Haliburton, and the municipalities within their limits, the cities, towns and villages within the limits of the territorial districts of northern Ontario set forth in section 1 of the Act and the townships and improvement districts included in the territorial districts and listed in section 2 are municipal corporations within the meaning and for the purposes of any Act. [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, paras. 6 and 17 of s. 1 and s. 502 at p. 132, *infra*.]

The metropolitan and regional areas and the municipalities within those areas were established and incorporated by special Acts and, except as specified by the special Acts, they are unaffected by THE MUNICIPAL ACT or any other Act. The territorial districts set out in section 1 of THE TERRITORIAL DIVISION ACT are unorganized territories and the geographic townships are townships without municipal organization.

UNORGANIZED TERRITORIES

Paragraph 26 of section 1 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, defines "unorganized territory" as that part of Ontario without county organization.

INCORPORATED TOWNSHIPS IN UNORGANIZED TERRITORIES

Section 465 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, is as follows,

465.-(1) The Council of a township in unorganized territory surveyed

> without road allowances, but in which 5 *per cent* of the area is reserved for highways, may pass by-laws for opening and making highways where necessary and the provisions of this Act as to compensation for lands taken or injuriously affected by the exercise of the powers conferred by this section do not apply.
>
> (2) In case of deviations from road allowances and of roads laid out where there are no road allowances as provided in subsection 1, the corporation shall cause a plan thereof, so far as it affects ungranted lands of the Crown, to be made by an Ontario Land Surveyor and shall file the plan in the Ministry of Natural Resources.

Paragraph 17 of section 1 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, defines "municipality" as a locality the inhabitants of which are incorporated.

Paragraph 6 of section 1 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, defines "city", "town", "village", "township" and "county" respectively as a city, town, village, township or county, the inhabitants of which are a body corporate within the meaning and for the purposes of this Act.

IMPROVEMENT DISTRICTS

Subsection 1 of section 502 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, says,

> 502.-(1) Every improvement district shall be deemed to be for all purposes of every Act a township municipality, a village municipality or a town municipality as may be designated ... by the Municipal Board ...

ROADS IN UNINCORPORATED TOWNSHIPS

By An Act to provide for the performance of Statute Labour in unincorporated townships, 1882-83, 46 Vic. ch. 22 (Assented to 1st February, 1883.), twenty resident landholders in any township which was not incorporated (either alone or in union with some other township) were given the right to have a public meeting called for the purpose of electing road commissioners. [See THE STATUTE LABOUR ACT, R.S.O. 1970, ch. 445, s. 10 *et seq.* and in particular s. 22 thereof, at p. 21, *supra*.]

Note that THE STATUTE LABOUR ACT, R.S.O. 1970, ch. 445, is applicable to organized townships as well as to unorganized townships, unless a by-law to abolish statute labour has been passed by the council of the township. On the other hand, THE LOCAL ROADS BOARDS ACT, 1964, 12-13 Eliz. II. ch. 56, applies only in territory without municipal organization. [See THE LOCAL ROADS BOARDS ACT, R.S.O. 1970, ch. 256.]

Section 39 of THE LOCAL ROADS BOARDS ACT, R.S.O. 1970, ch. 256, says,

> 39. Where a board is established under this Act, THE STATUTE LABOUR ACT shall, on the 1st day of January next following the date of the establishment of the board, cease to apply to the local roads area administered by that board, and, where the local roads area includes all of an area administered by road commissioners elected under THE STATUTE LABOUR ACT, the road commissioners shall transfer to the board any assets held by them in their capacity as road commission-

ers, and, where the local roads area includes part of an area administered by road commissioners elected under THE STATUTE LABOUR ACT, the road commissioners may transfer to the board any assets held by them in their capacity as road commissioners in respect of such part.

Subsection 6 of section 7 of THE LOCAL ROADS BOARDS ACT, R.S.O. 1970, ch. 256, says,

> 7.-(6) The owners of land in the proposed local roads area who are present at the meeting shall by vote determine the boundaries of the proposed local roads area, which area may be smaller but not larger than the area originally proposed, and the local roads to be included therein.

Subsection 1 of section 8 of THE LOCAL ROADS BOARDS ACT, R.S.O. 1970, ch. 256, says,

> 8.-(1) Upon receipt of a petition, the Minister (of Transportation and Communications), if he considers it in the public interest so to do for the purposes of this Act, may, by order in writing, establish the proposed local roads area, or any smaller or larger area as he considers appropriate, as a local roads area, and he may designate the local roads to be included therein.

Section 33 of THE LOCAL ROADS BOARDS ACT, R.S.O. 1970, ch. 256, is as follows,

> 33.-(1) The Minister (of Transportation and Communications) shall cause the moneys credited to each board to be spent on the local roads area in carrying out work determined by the board and approved by him under section 10, or in acquiring right-of-way for roads.
>
> (2) For any of the purposes of this Act, the Minister (of Transportation and Communications) may exercise any of his powers under Part I of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, including the power to expropriate land.
>
> (3) All land heretofore or hereafter acquired under subsection 2 is vested in the Crown in right of Ontario and is under the jurisdiction and control of the Minister (of Transportation and Communications) and when no longer required for the purposes of this Act may be sold, leased or otherwise disposed of by the Minister.

STOPPING UP AND CLOSING A HIGHWAY

1. IN AN INCORPORATED MUNICIPALITY

(a) by by-law under section 443 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284; [See pp. 129, 130 and 131, *supra*, and

(b) where a street on a plan has been dedicated by the owner and a lot fronting on the street has been sold according to the plan but the street has not been assumed by the municipality, by a judge's order made pursuant to clause *c* of subsection 1 of section 86 of THE REGISTRY ACT. [See p. 105, *supra*.]

NOTICE OF PROPOSED BY-LAW

Section 446 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, provides as follows,

> 446.-(1) Before ng a by-law for stopping up, altering,

widening, diverting, selling or leasing a highway or for establishing or laying out a highway,

(a) notice of the proposed by-law shall be published at least once a week for four successive weeks, and in the case of a village or of a township with a population of less than 40,000 shall be posted up for at least one month in six of the most public places in the immediate neighbourhood of the highway or proposed highway; and

(b) the council or a committee of council shall hear in person or by his counsel, solicitor or agent any person who claims that his land will be prejudicially affected by the by-law and who applies to be heard.

(2) The clerk shall give the notices upon payment by the applicant, if any, for the by-law, of the reasonable expenses to be incurred in so doing.

SOME BY-LAWS FOR STOPPING UP AND CLOSING HIGHWAYS THAT HAVE BEEN QUASHED

In *Jones v. Township of Tuckersmith (1917), 45 O.L.R. 67,* it was held, by the Supreme Court of Canada, that a by-law closing up part of a street was invalid as serving only private interests.

In *Gilmore v. Township of Westminster (1929), 64 O.L.R. 344,* it was held that the approval of the Lieutenant Governor in Council was not required in the case of a by-law stopping up an allowance for road reserved in the original survey along or leading to the bank of a very deep pond covering about 13 acres. The road in question "does not lead to the bank of any river or stream; and, while the pond may answer the description of 'other water,' in the expression 'lake or other water,' still the road, while it leads to the shore of a pond, is not a road on the shore of the pond within the meaning of the subsection." [See subsection 3 of section 443 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, *supra* at p. 129.] But the by-law was invalid because it did not provide another convenient road or way of access to the plaintiff's land.

In *In Re John Inglis Co., Ltd. and The City of Toronto (1904), 8 O.L.R. 570,* the defendant's council passed a by-law closing part of Strachan Avenue in the City of Toronto. Strachan is a street made or laid out by His Majesty's Ordnance or the principal Secretary of State in whom the Ordnance estate became vested under the statute of the Province of Canada passed in the 19th year of the reign of Her late Majesty, Queen Victoria, ch. 45, or the Consolidated Statutes of Canada ch. 24, respecting the Ordnance and Admiralty lands or by the Dominion of Canada and, as such, the consent of the Government of the Dominion of Canada to the passing of the by-law was required. The requisite consent was not obtained and, since such consent was not and could not be recited in the by-law as required by the Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 628, it was void. ... that void by-law in the passing of which council had exhausted its powers, could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law. [See now THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 443(4), at p. 130, *supra*.]

Section 396 of The Consolidated Municipal Act, 1922, 12-13 Geo. V. ch. 72, authorized municipal councils to enact by-laws

for granting a bonus for the promotion of manufactures in the municipality, or for the promotion of iron works, rolling mills, works for refining or smelting ore, or the establishment of grain elevators, or aiding a beet sugar factory, a tobacco drier, an arena, a sanitarium, within the municipality or an adjacent municipality, to such person, in respect of such branch of industry or undertaking, and on such terms and conditions as to security and otherwise as may be deemed proper.

The word "bonus" as used in section 396 of The Consolidated Municipal Act, 1922 included, among other matters, the stopping up, opening, widening, paving or improving of a highway or public place ... by the corporation for the use or benefit of the manufacturing business to be aided.

The powers of a municipal corporation to grant bonuses in aid of any manufacturing business ... was limited by The Bonus Limitation Act, 1924 to a fixed assessment as provided by The Municipal Act notwithstanding anything to the contrary in any general Act or in any special Act.

In *Re Edwards and Town of Brampton, [1933] O.W.N. 635 (H.C.J.)*, the closing up and sale of part of a street were found to be an inseparable part of a bonus agreement, and both the closing and sale were found to be solely for the private advantage and purposes of the purchaser and not for the needs of the municipality - apart from a somewhat indefinite agreement to employ individuals and the expenditure to individual advantage of money in construction, intended to increase the business of the purchaser. The by-law proposing to close and sell the part of the street was quashed: (1) the Municipal Act provides for the price being fixed by the council in case of a sale of a stopped up part of a highway - whereas here the council agreed to be satisfied with the County Judge's decision thus emphasizing that the transaction was intended as part of a bonus; (2) the transaction was forbidden by sec. 1 of the Bonus Limitation Act, R.S.O. 1927, ch. 234.

The bonus Limitation Act, R.S.O. 1937, ch. 267, was repealed by The Municipal Amendment Act, 1950, ch. 46, s. 23.

2. IN A PROVISIONAL JUDICIAL DISTRICT NOT BEING WITHIN AN ORGANIZED MUNICIPALITY

Section 464 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, says,

> 464. The Lieutenant Governor in Council may stop up, alter, widen or divert any highway or part of a highway in a provisional judicial district not being within an organized municipality, and may sell or lease the soil and freehold of any such highway or part of a highway that he has stopped up or that, in consequence of an alteration or diversion of it, no longer forms part of the highway as altered or diverted.

NOTE: "any highway" in section 464 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, would appear to include a highway under section 57 of THE SURVEYS ACT. [See p.107, *supra*.]

3. IN A LOCAL ROADS AREA

Land acquired by the Minister of Transportation and Communications under subsection 2 of section 33 of THE

LOCAL ROADS BOARDS ACT, when no longer required for the purposes of the Act, may be sold, leased or otherwise disposed of by him under subsection 3 of section 33 of the Act. [See p. 133, *supra*.] But the power to stop up and close, etc., public roads designated "local roads" under subsection 1 of section 8 of THE LOCAL ROADS BOARDS ACT [See p. 133, *supra*.] would appear to belong to the Lieutenant Governor in Council under section 464 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284. [See p. 135, *supra*.]

SALE OF THE SOIL AND FREEHOLD OF A STOPPED-UP HIGHWAY BY A MUNICIPAL COUNCIL

Section 461 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, is, in part, as follows,

> 461.-(1) Where a highway for the site of which compensation was paid is established and laid out in place of the whole or any part of an original allowance for road, or where the whole or any part of a highway is legally stopped up, if the council determines to sell such original allowance or such stopped-up highway, the price at which it is to be sold shall be fixed by the council, and the owner of the land that abuts on it has the right to purchase the soil and freehold at that price.
>
> (2) Where there are more owners than one, each has the right to purchase that part of it upon which his land abuts to the middle line of the stopped-up highway.
>
> (3) If the owner does not exercise his right to purchase within such period as may be fixed by the by-law or by a subsequent by-law, the council may sell the part that he has the right to purchase to any person at the same or a greater price.

In *Tonks et al. v. Township of York and Reid et al. (1967), 59 D.L.R. (2d) 310 (S.C.C.)*, the municipal council had stopped up and closed a highway and sold part of it, contrary to section 487 of the Municipal Act [See now THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 461, *supra*.] without first offering it at a fixed price to the abutting owner or owners.

Porter, C.J.O., who delivered the judgment of the Ontario Court of Appeal in this case, *sub nom. Reid et al. v. Township of York and Tonks (1965), 50 D.L.R. 674*, said, at p. 675:

> "This is an appeal by the plaintiffs from the judgment pronounced by King, J., on April 9, 1963, dismissing the action of the plaintiff without costs.
>
> "There are two main issues in this appeal arising from the following circumstances:
>
> (1) the Township of York closed a road adjacent to the property of the plaintiffs, thereby cutting off access to the rear of the plaintiffs' property. The township then sold the portion of the closed road adjacent to the plaintiffs' property without fixing a price and consequently denying the appellants the opportunity of buying the portion of the road at a price so fixed, as provided by ..."[s. 461 of the Municipal Act, R.S.O. 1970, ch. 284, *supra*.];
>
> (2) the purchaser of the closed road, was the Reeve of the township who bought it from the township in the name of a nominee. The appellants contend that consequently the transaction was fraudulent and null and void and that the learned trial Judge should have so found.

"The action was brought by the plaintiffs for a declaration that By-law 15649 of the defendant corporation and the sale of the closed road thereby authorized and the subseqent sale of the said road to the defendant are null and void and for an order setting the same aside and for incidental relief."

The following is from the judgment of the Supreme Court of Canada delivered by Judson, J.:

"The Court of Appeal held that non-compliance with ... [S. 461] of the Municipal Act results in a void transaction. They also held that in this particular case the conduct of the municipal official [Tonks] was fraudulent. They set aside that part of the by-law which authorized the sale and declared the deed of conveyance to be null and void.

"In 1955 the two plaintiffs, Hazel Doreen Reid and John Caird Reid, who are husband and wife, purchased No. 2 Paulson Rd. in the Township of York as joint tenants. In 1959, the husband conveyed his interest to his wife, who remains the sole owner.

"The defendants, Christopher A. Tonks and Anna Tonks, are husband and wife. Christopher Tonks was elected a member of the municipal council of the Township of York in 1951. He was elected as deputy reeve in 1952 and was appointed acting reeve on September 4, 1956. He was elected reeve in December, 1956, and held this office until December 1960.

"No. 2 Paulson Rd. was a corner lot before Myra Rd. was closed. It fronts on Paulson Rd. and its easterly boundary was Myra Rd. Paulson Rd. runs east and west, Myra Rd. north and south. The property was on the northwest corner. There is no access for vehicles to the rear of No. 2 Paulson Rd. from Paulson Rd. Before the closing there was access to the rear of the property from Myra Rd. Myra Rd. had been dedicated as a highway in 1951 by by-law of the township and it was closed on August 13, 1956, by By-law 15396. There is no attack on the propriety of the closing.

"On September 10, 1956, Reid wrote to the township clerk and solicitor to say that he wished to acquire part of the west side of Myra Rd. as closed by the by-law to enable him to gain access to the rear of his property. He received an acknowledgment of his letter from the clerk and solicitor telling him that it would be put before council at its next meeting and that he would be advised later. Reid's letter was put before the Committee of General Purposes of the township on September 17, 1956. Tonks was then acting reeve of the township and was present at the meeting of the Committee, which referred the request to the Committee on Sale of Land. The report of the Committee of General Purposes referring Reid's request was approved by the township council at a meeting on October 9, 1956, at which Tonks was present as Acting Reeve. There is no record that Reid was advised that his request was being considered, or that the Committee on Sale of Land ever dealt with his application. His letter is missing from the file and has never been found. Reid heard nothing further about his application and assumed that nothing could be done.

"Early in 1957, Tonks became interested in buying the southern half of Myra Rd., which abutts on the plaintiff's property. He well knew as a member of Council that he was disqualified from purchasing. He had consulted the township solicitor and had received this advice. Tonks discussed the matter with another Deputy Reeve and decided to buy the property in the name of a nominee. In June, 1957, he had one Joseph Fraser, a friend and relative by marriage, submit an offer for $6,000. Fraser enclosed his own cheque for $1,320 with the offer as a deposit. This money was supplied by Tonks. The offer was made subject to a condition that the municipality as vendor would secure the approval of the

Ontario Municipal Board to amend a restrictive by-law against building on a lot having a frontage of less than 70 ft. Myra Rd. was only 66 ft. wide. Fraser's offer of June 10, 1957, was submitted to the Committee of General Purposes, which recommended directly to Council that the offer be accepted. Tonks was then Reeve and was present at the meeting. If it makes any difference, there is no evidence that Tonks declared his interest at the meeting, although he does say that he may have disclosed it to some of the members before the meeting. There is no reference to any disclosure in the minutes of the meeting.

"On June 17th, the report of the Committee of General Purposes was approved by Council, which formally accepted Fraser's offer by enacting By-law 15649. On June 24, 1957, Council enacted By-law 15656 permitting the erection of a house on these lands notwithstanding that they had a frontage of less than 70 ft. Tonks was present at that meeting and signed the by-law in his capacity as Reeve. Again he made no disclosure of his interest in the by-law. He says that he assumed that everybody knew. The by-law was submitted to and approved by the Ontario Municipal Board without any disclosure of Tonks' interest.

"Fraser, who was the first nominee of Tonks, did not take a conveyance of the property. He assigned his right to purchase to Marie Eunice Froman, another nominee of Tonks. She received a deed from the township on January 14, 1958, executed by Tonks, as Reeve, and by the township clerk. On December 19, 1957, Fraser, the first nominee, had paid the balance of the purchase price with money supplied by Tonks.

"On July 17, 1958, Marie Eunice Froman executed a deed to Tonks and his wife. This deed was registered on the following day, which was more than one year after the enactment of By-law 15649 which had approved the sale to Fraser.

"Tonks applied for a building permit to erect a house on this property on December 20, 1957. His plans were approved on January 14, 1958, and he began building the house in April, 1958.

"The learned trial Judge found that the township had not complied with the provisions of ... [s. 461] of the Municipal Act in selling this property. He was, however, of the opinion that the township By-law 15649, passed on June 17, 1957, approving the acceptance of Fraser's offer was voidable only and could not be impeached except by an application to quash brought within one year of its passage. No such application having been made, the action failed and was dismissed with costs.

"The Court of Appeal in reversing the judgment held that the by-law was a nullity for non-compliance with ... [s. 461] and should be set aside on that ground. They also found fraud on the part of Tonks. They further rejected a defence that the plaintiffs had waived their rights under ... [s. 461] and had acquiesced in Tonks' purchase.

"I agree with the judgment of the Court of Appeal that if the provisions of ... [s. 461] of the Municipal Act are not observed, the Council is without authority and a by-law authorizing sale is void and is open to attack notwithstanding that more than a year has elapsed from the date of its passing. ..."

After quoting section 477 [now s. 461] of the Municipal Act, he continued at p. 314:

"Words could not be plainer. The Council was under no compulsion to sell, but if it determined to sell, it had to sell in accordance with those provisions. It fixed no price and it made no offer to the abutting owners. Council had no authority whatever to make this sale to Tonks. It was not within its competence to pass any by-law authorizing such a sale or the execution of a deed to Tonks. This is the

effect of *Jones v. Township of Tuckersmith (1915), 23 D.L.R. 569, 33 O.L.R. 634* [revd on other grounds *47 D.L.R. 684, 45 O.L.R. 67*], and I agree with the analysis of that case in the reasons of the Court of Appeal *50 D.L.R. (2d) 674, [1965] 2 O.R. 381*."

The analysis by Porter, C.J.O., of *Jones v. Township of Tuckersmith (1915), 23 D.L.R. 569*, in *Reid et al. v. Township of York and Tonks (1965), 50 D.L.R. 674*, beginning at *p. 680* of that report, is as follows:

"In *Jones v. Township of Tuckersmith* ..., Meredith, C.J.O., considered *inter alia*, a by-law which purported to close part of a street called Mill St., and to authorize the execution of a deed of conveyance of the closed portion to one Kruse. The plaintiffs brought an action to set aside the by-law and the sale and conveyance which the township made to Kruse *et al*. There was also a summary application for an order quashing the by-law. It was clear from the evidence that the property had not been offered to the abutting owners, among whom were the plaintiffs. The section of the Municipal Act then in force was s. 640 of c. 19, Statutes of Ontario, 1903, which read as follows:

> 640. The council of every county, township, city, town and village may pass by-laws,
>
> (11) For selling the original road allowance, to the persons next adjoining whose lands the same is situated, where a public road, for the site or line of which compensation has been paid, has been opened in lieu of the original road allowance, and for selling, in like manner, to the owners of any adjoining land, any road legally stopped up or altered by the council; and in case such persons respectively refuse to become the purchasers at such price as the council thinks reasonable, then for the sale thereof to any other person for the same or greater price.

This section is substantially similar in effect to the present section. In *Jones v. Township of Tuckersmith* at *pp. 585-6*, Meredith, C.J.O., said:

> The by-law is, however, in my opinion, open to the objection that the council had no authority to sell the *situs* of the road without first offering it to the abutting owners at a price fixed by the council, and that it is only in the event of the abutting owners declining to purchase that authority is given to sell to any one else, and then authority is given to sell at that price or a greater one. ...
>
> ... It is also clear, I think, that, while the sections are permissive in the sense that it is optional with the council to sell or not to sell, the council, if it determines to sell, is bound to sell in the manner prescribed by sub-sec. 11. That it should be obligatory is manifestly only fair, and it is in accordance with the policy of the legislation as indicated in dealing with the other mode of closing up a highway, by an alteration of a registered plan under the provisions of the Registry Act.

"The judgment was appealed to the Supreme Court of Canada [*47 D.L.R. 684, 45 O.L.R. 67*]. With four Judges agreeing, and one expressing no opinion, it was held that the entire by-law was invalid. The reasoning in these judgments was diverse and did not follow that of Meredith, C.J.O., but no disapproval was expressed of the judgment of Meredith, C.J.O., with respect to his views as to the invalidity of that part of the by-law which authorized the execution of a deed to the said Kruse. From this decision and the terms of the statute, in my view, it would follow that the selling of a road allowance without

offering it to abutting owners is not a matter over which council has jurisdiction. Nor is the by-law one which becomes unimpeachable after the elapse of one year. The council had no authority. It was not a matter over which council had authority subject to certain conditions. The Chief Justice was treating it as void and not merely voidable. Since, in the case at bar, the land was never offered to adjoining owners, the council never had the authority to offer it to other bidders."

Returning to the judgment of Mr. Justice Judson in *59 D.L.R.310, at p. 314*, he said:

"The Court of Appeal stated a second ground for its reasons for judgment. They held that the Reeve of this municipality fraudulently acquired this land in violation of the rights of abutting owners. A mere recital of the facts as I have outlined them leads irresistably to this inference. No innocent construction is possible. Although Reid had inquired in good time about his right to purchase, he was ignored, and I think deliberately ignored, and the person who appeared on the scene as the ultimate purchaser was the Reeve. There can be no doubt that he had determined to purchase this property when he well knew that his position forbade him to do so, and Reid had no notice of this until it was an accomplished fact. When he learned about it, instead of at once attacking the transaction he tried to make a deal with Tonks which would give him access to the rear of his lot. From what Reid did, it is argued that he renounced or waived his rights under ... [s. 461]. Reid's explanation is that he was confronted by the fact of acquisition and that he did the best he could. It is urged against him that he did not follow up his letter of 1956; that when he knew that Tonks had become the purchaser he signed consents on his own behalf and persuaded others to sign consents to have the restriction of 70 ft. varied; that in March, 1958, he was not interested in buying more land. He had in fact separated from his wife and was not living in the house. I have already mentioned that he conveyed his interest to his wife in 1959. But he also said that he was promised access to the rear of his lot by Tonks - Reid says 12 ft. wide, Tonks says 8 ft. - but as a result of Tonks' building plans, which were perhaps dictated by the configuration of the ground, the space between the two houses was too narrow for vehicles to pass between them.

"I can find nothing in the conduct of the Reids which would indicate any waiver of their rights and I do not think that they can be deprived of these rights except by compliance with ... [s. 461]. There is nothing in this case but a by-law which was passed in bad faith at the instigation of the Reeve and simply to subserve his interest as a private individual. Such a by-law is a nullity.

"The final point raised by the appellant is that under s. 38(1) of the Conveyancing and Law of Property Act, R.S.O. 1960, c. 66, [now R.S.O. 1970, c. 85, s. 38(1)] he is entitled to a lien of $30,600 upon the lands inquestion. This is what the land and the improvements cost him. Section 38(1) reads:

> 38(1) Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

"This section does not apply to a case such as this. Tonks

acquired this land knowing that ... [s. 461] had not been complied with and knowing that he had no right to purchase. He could have no honest belief that he was making improvements on land that was his own. He knew the weakness of his title and he took his chance. His claim for a lien should be rejected."

The judgment of the Court of Appeal was affirmed and the appeal was dismissed with costs.

ABUTTING OWNERS

In *Catkey Construction (Toronto) Ltd. et al. v. Bankes et al., [1971] 1 O.R. 205,* the question arose whether the owner of a parcel of land contiguous to the terminus of a stopped-up portion of a street was an abutting owner within the meaning of section 477 of the Municipal Act, R.S.O. 1960, ch. 249, [See THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 461, at p. 136, *supra*.] and whether the municipality had complied with the section.

Jessup, J.A., who delivered the judgment of the Court of Appeal, said,

We agree that the action was properly dismissed, but in his judgment [*1970 2 O.R. 687* at *p. 699*] the trial Judge said, in referring to s. 477:

"Rather, I find that the intention was that the word 'abuts' means and is equated with the word 'front' and that only an owner whose land fronts on the stopped-up highway has the right to purchase. An owner whose land is on the side or flank has no right to purchase."

In my view, an abutting owner within the meaning of s. 477 means an owner, the front, rear or side of whose property is contiguous to a side of a highway which is stopped up, but does not mean or include an owner whose property is contiguous to either terminus of a highway. The words in s-s. (2) of s. 477, "middle line of the stopped-up highway", mean the middle line between the sides of the highway and not between the termini or ends of the highway. The contrary construction urged by the appellant would produce absurd results, if it could be made applicable at all, that could not have been intended by the Legislature.

PART 13 - PROVINCIAL HIGHWAYS

THE HIGHWAY IMPROVEMENT ACTS

The first Highway Improvement Act was enacted in 1901 by 1 Edw. VII. ch. 32. It was repealed and a new Highway Improvement Act was enacted by 7 Edw. VII. ch. 16. Both Acts, 1 Edw. VII. ch. 32 and 7 Edw. VII. ch. 16, were intituled An Act for the Improvement of Public Highways. Their object was the improvement of existing highways and the adoption of county highway systems and, in some circumstances, municipal road schemes. The Province provided funds to cover part of the costs involved in the improvement of existing roads and in the purchase of toll roads. In order to qualify for aid under provisions of either Act, highways were to be constructed or repaired according to the regulations of the Public Works Department with respect to highways.

MAIN ROADS

The Ontario Highways Act, 1915, 5 Geo. V. ch. 17, instituted the Department of Public Highways to be presided over by the Minister of Public Works and Highways.

The Act made provision for aid to the council or corporation of a county in respect to the maintenance and repair of roads in any system of roads assumed by by-law of the council of the county under The Highway Improvement Act, for payment of twenty-five *per cent.* of the salary of an overseer or foreman appointed under section 11 of the Act by the council of any township municipality, and for the payment of an amount, not in excess of two dollars for each acre of assessed area of a village having a population of not more than two persons to each acre of assessed area, for the construction or extension of connecting links or main or county roads in the village.

The council of a county having or adopting a system of county roads under The Highway Improvement Act could apply to the Lieutenant-Governor in Council for direction to select a commission or commissions who would have the duty to designate and define suburban roads. Roads designated as "suburban roads" continued to be county roads under the jurisdiction and control of the county council but the city or town was required to contribute towards their construction and maintenance.

When, in the opinion of the Lieutenant-Governor in Council, any road should, in the public interest, be constructed as one work, then upon petition of the municipalities through or in which the road or any part thereof was to be constructed, the Act provided for the appointment of a board of trustees by the Lieutenant-Governor in Council with corporate powers to assume control of such road for construction and maintenance. A report on the proposed work was to be prepared by an engineer of the Department for the board and a copy of the report was to be transmitted by registered post to the head and clerk of each municipality benefited. Notice was also to be sent by registered post to the last known address of each owner of property assessed for a proportion of the cost of the work. Unless notice of objection was received from a majority of the municipalities interested or a petition was presented signed by at least half of the property owners interested and representing at

least half the value of the property assessed, the Lieutenant-Governor in Council could then denominate the road in question a *main road* and the board thereupon had authority to proceed with its construction. "Main roads" constructed under the Act vested in the boards of trustees for all purposes.

THE TORONTO AND HAMILTON HIGHWAY COMMISSION

In 1915, An Act respecting the Toronto and Hamilton Highway Commission was enacted by 5 Geo. V. ch. 18. That Act recited as follows,

> Whereas it has been deemed expedient that in order to meet the requirements of vehicular traffic between the City of Toronto, in the County of York, and the City of Hamilton, in the County of Wentworth, a permanent roadway should be constructed and maintained; and whereas the councils of the municipal corporations interested have requested that the said roadway should be constructed and provision made for the maintenance thereof upon the terms hereinafter set forth; and whereas in order to facilitate the carrying out of the said work a commission was constituted by Order-in-Council, bearing date the seventeenth day of September, A.D. 1914, to be known as the Toronto and Hamilton Highway Commission ... for the purpose of constructing, laying down, managing and maintaining a permanent pavement from the City of Toronto to the City of Hamilton along a route to be selected by the Commission ... and whereas it is expedient that the appointment of the Commission be validated and confirmed and that authority should be given to carry out the work upon the terms herein set forth;
>
> Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:-

The interpretation section, section 2, of the Act, said,

> 2. In this Act,-
>
> *(a)* "Commission" shall mean Toronto and Hamilton Highway Commission;
>
> *(b)* "Highway" shall mean highway as defined by The Municipal Act;
>
> *(c)* "Roadway" shall mean and include the permanent pavement which the Commission is authorized to construct and all lands, portions of highway, works and materials to be taken, constructed, laid out or used in connection therewith, or over which the commission has jurisdiction for any purpose under this Act.

The Commission was given power to survey, lay out, construct, complete, maintain, equip and repair a permanent roadway from the western limits of the City of Toronto to the City of Hamilton, along the course laid down upon the plan of the roadway filed in the Department of Lands, Forests and Mines on the 19th day of February, 1915, and subject to the provisions contained in the Act for that purpose were given and enabled to exercise within the limits of any municipal corporation along the course of the roadway all the powers which could be exercised by a municipal corpo-

ration authorized to lay out and construct a highway.

The Commission was also given power to acquire by purchase or expropriation any existing road or other land declared by it to be necessary or expedient in the constructing of the roadway, and to enter upon, survey, designate and lay out any land, gravel, stone, earth or other material required for the construction and maintenance of the said road or for any works connected therewith, and for those purposes the Commission was given and empowered to exercise the like powers and was to proceed in the manner provided by The Ontario Public Works Act, where the Minister of Public Works took land or property for the use of Ontario and the provisions of that Act were to apply *mutatis mutandis*.

The Toronto and Hamilton Highway Commission Act, 1915, was superseded by The Provincial Highway Act in 1917 and, subsequently, in 1925, it was repealed by The Provincial Highway Act, 1925. Section 5 of that Act said,

> 5. The Toronto and Hamilton Highway Commission Act and the amendments thereto are repealed and the Toronto and Hamilton Highway shall hereafter be deemed to be a provincial highway subject to the provisions of The Provincial Highway Act, and the said Act and the amendments thereto shall apply to the Toronto and Hamilton Highway.

PROVINCIAL HIGHWAY SYSTEM

The Provincial Highway Act, 1917, 7 Geo. V. ch. 16, contains the following recital,

> Whereas it is expedient that a highway or system of highways should be established from the southwestern boundary of Ontario to the boundary line between Ontario and Quebec, together with highways connecting centres of population, or other important terminal points, and that the same should be constructed in such a manner and of such material as may be best suited for the traffic thereon; and whereas the traffic upon such highway or system of highways is or will be of general benefit to the inhabitants of Ontario, and it would be unjust and unfair that the cost of providing for such traffic should be borne wholly by the municipalities through which the same would pass; and whereas it is desirable that the said work should be under the direction and control of the Minister and the Department of Public Highways;
>
> Therefore His Majesty, *etc., etc.*

The Provincial Highway Act, 1917, defined "Highway" to mean a common or public highway, including a street, or bridge forming part of a highway, or on, over, under or across which a highway passes, or other structure thereon.

The Lieutenant-Governor in Council was authorized, upon the recommendation of the Minister of Public Works and Highways to designate any highway or system of public highways throughout Ontario to be acquired, constructed, assumed, repaired, re-located, deviated, widened and maintained by the Minister for Ontario as a Provincial Highway. Every Provincial Highway and all property acquired by Ontario under that Act was vested thereby in the Crown under the control of the Department of Public Highways.

THE KING'S HIGHWAY

The Ontario Highways Act, 1915, The Provincial Highway Act, The Highway Improvement Act, The Obstructions on Highways Removal Act, 1920, and amendments thereto, were, except for certain sections, repealed and superseded by The Highway Improvement Act, 1926. One of the unrepealed sections, section 1 of The Highway Improvement Act, 1919, was omitted and the remaining unrepealed sections were neither repealed nor consolidated when the statutes were revised in 1927.

The Highway Improvement Act, 1926, came into force on April 8th, 1926, and extended not only to county road systems, suburban roads and township roads, but to Provincial highways.

Subsection 2 of section 52 of The Highway Improvement Act, R.S.O. 1927, ch. 56, was repealed by section 11 of The Highway Improvement Act, 1930, and the following was substituted therefor,

> (2) Every highway heretofore or hereafter constructed, designated and assumed in accordance with this section shall be known as "The King's Highway" and the words "The King's Highway" are substituted for the words "Provincial Highway" wherever they occur in this Act or any other Act of the Province of Ontario.

The title of R.S.O. 1970, ch. 201, namely, The Highway Improvement Act, was repealed and the title The Public Transportation and Highway Improvement Act was substituted therefor by The Highway Improvement Amendment Act, 1971, Vol. 2, ch. 61, s. 1.

The heading of Part I of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, namely, The King's Highway, was repealed by The Public Transportation and Highway Improvement Amendment Act, 1973 (No. 2), ch. 67, s. 1, and the heading Land Acquisition, Highways and other Works was substituted therefor.

LAND ACQUISITIONS, HIGHWAYS AND OTHER WORKS

Section 2 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, is as follows,

> 2.-(1) All property acquired under this Part (Part I) is vested in the Crown and is under the jurisdiction and control of the Ministry.
>
> (2) Subject to subsection 2 of section 3, all property that is under the jurisdiction and control of the Ministry may be leased, sold or otherwise disposed of by the Minister. *[1972 ch. 1, s. 2.]*
>
> (3) The Minister may authorize any ministry or agency of the Crown or any municipality, including a district, metropolitan or regional municipality, or a local board thereof or any corporation or person, by lease, licence or other arrangement,
>
> *(a)* to use; or
>
> *(b)* to construct, maintain and use buildings, structures or improvements in or on,
>
> any space or area located over, across or under a highway under the jurisdiction of the Ministry where, in the opinion of the Minister, such construction, maintenance or use can be carried out without

unduly interfering with the public use of the highway. *[1972, ch. 1, s. 2.]*

NOTE: (1) Subsection 1 of section 2 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, derived from section 4 of The Provincial Highway Act, 1917, 7 Geo. V. ch. 16;

(2) subsection 2 of the said section 2 derived from section 8 of The Provincial Highway Act above mentioned; and

(3) subsection 3 of the said section 2 was first enacted by The Highway Improvement Act, 1970, 19 Eliz. II. ch. 107, s. 1.

DESIGNATION OF THE KING'S HIGHWAY

Section 5 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, is as follows,

5.-(1) The Lieutenant Governor in Council may designate a highway or proposed highway as the King's Highway.

(2) The order in council designating a highway or proposed highway as The King's Highway shall be registered in the proper land registry office and any such order in council heretofore registered shall be deemed to have been required to be so registered. *[1973, 22-23 Eliz. II. ch. 67, s. 4.]*

NOTE: Subsection 1 of section 5 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, derived from subsection 1 of section 3 of The Provincial Highway Act, 1917, 7 Geo. V. ch. 16.

NOTICE OF AN ORDER IN COUNCIL

1. BY REGULATION

The practice of publishing a Table of Proclamations, Orders in Council and Regulations at the conclusion of the annual volume of the Statutes of Ontario, which was begun in 1935, was discontinued when The Regulations Act, 1944, 8 Geo. VI. ch. 52, was enacted. Section 8 of the Act, which came into force on the 1st day of July, 1944, was as follows,

8.-(1) Notwithstanding the provisions of this Act, every regulation made prior to the date of the coming into force of this Act shall continue in force and effect until the 31st day of December, 1944, but every such regulation shall be filed on or before the 31st day of December, 1944, and the provisions of this Act shall apply *mutatis mutandis*, thereto.

(2) This section shall not affect any legal proceeding which is commenced prior to the 31st day of December, 1944.

The word "regulation" as defined by clause *(e)* of section 1 of The Regulations Act, 1944, meant,

any regulations, rule, order or by-law of a legislative nature made or approved under the provisions of any Act of this Legislature by the Lieutenant-Governor in Council, a Minister of the Crown, a department of the public service, an official of the government or a board or commission all the members of which are appointed by the Lieutenant-Governor in Council, but shall not include a by-law of a municipality or local board, as defined in The Department of

Municipal Affairs Act.

An Order in Council designating a highway as the King's Highway was a regulation within the meaning of The Regulations Act, 1944, and, unless filed with the Registrar of Regulations, it was declared by subsection 4 of section 2 of the Act to have no effect. Furthermore, all such regulations were declared by subsection 3 of section 3 to be invalid as against a person without actual notice thereof, unless published in The Ontario Gazette. However, the Act was amended to exclude an order of the Lieutenant-Governor in Council designating any highway or system of public highways as the King's Highway from the operation of the Act by section 1 of The Regulations Amendment Act, 1948, 12 Geo. VI. ch. 78. That Act came into force on March 31st, 1948, and is deemed to have had effect on and after the 1st day of July, 1944, and the filing of any regulation which by that Act was exempted from The Regulations Act, 1944, was thereby vacated.

In effect, an Order in Council designating a highway as the King's Highway was to be regarded as an administrative order.

2. BY REGISTRATION IN THE PROPER LAND REGISTRY OFFICE

Before subsection 2 of section 5 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, was enacted by section 4 of The Public Transportation and Highway Improvement Amendment Act, 1973 (No. 2), 22-23 Eliz. II. ch. 67, [See p. 147, *supra*.] there was no statutory authority for the registration of an order in council designating a highway or proposed highway as the King's Highway.

In *MacFarlane et al. v. The Queen in right of the Province of Ontario represented by the Minister of Highways, [1973] 2 O.R. 325*, Cromarty, J., said, at *p. 334*,

> An Order in Council was passed designating a proposed highway, which includes a substantial portion of the plaintiffs' lands, as a King's Highway. The mere passing of an Order in Council does not appear to give anyone notice of its contents. Because of this the Minister of Highways deemed it "beneficial" to register this Order in Council.

And, after quoting section 57 of The Registry Act, R.S.O. 1960, ch. 348, as amended by section 23 of 1962-63, ch. 124, as follows:

> 57(1) Where by any Act of Canada or Ontario an Order in Council or a certified copy thereof is required to be registered or deposited in a registry office, the Order or certified copy may be registered and recorded in the general register.
>
> (2) Where an Order in Council or certified copy registered and recorded under subsection 1 contains a local description, it shall also be recorded in the abstract index. [Now s. 49.]

he said,

> Counsel for the defendant was unable to refer to any Act of Canada or Ontario requiring ... [an Order in Council designating part of the plaintiffs' lot as a King's Highway pursuant to s. 5 of The Highway Improvement Act, R.S.O. 1960, c. 171 (now s. 5 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, c. 201)] to be registered. It appears, therefore, there was no statutory authority for the registration of this Order in Council

against the plaintiffs' lands or elsewhere.

An order in council designating a highway as the King's Highway or as a secondary highway, registered pursuant to subsection 2 of section 5 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, enacted as aforesaid, is recorded in the Highways Register under the land titles system and in the Abstract Index under the registry system. A search of title under the land titles system is incomplete unless the Highways Register has been searched.

CONTROLLED-ACCESS HIGHWAYS

Section 33 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, was repealed and the following substituted by 1973, ch. 67, s. 12,

33.-(1) The Lieutenant Governor in Council may designate any,

(a) highway;

(b) proposed highway,

as a controlled-access highway and every highway so designated shall be deemed to be part of the King's Highway and the provisions of this Act and the regulations that apply to the King's Highway apply *mutatis mutandis* to such controlled-access highway.

(2) Any part of the King's Highway heretofore designated as a controlled-access highway under this Act or a predecessor thereof shall be deemed to have been designated in accordance with this section.

Subsection 3 of section 33, added by 1976, ch. 1, s. 3, is as follows,

(3) The order in council designating a highway or proposed highway as a controlled-access highway shall be registered in the proper land registry office and any such order in council heretofore registered shall be deemed to have been required to be so registered.

NOTE: The former section 33 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, derived from section 79a of The Highway Improvement Act, R.S.O. 1937, ch. 56, as enacted by section 7 of The Highway Improvement Amendment Act, 1939, 3 Geo. VI. ch. 19. The Lieutenant-Governor in Council was authorized by section 79a to designate any portion of the King's Highway as a divided highway.

Section 34 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, is, in part, as follows,

34.-(1) In this section, "road" includes an unopened road allowance.

(2) Subject to the approval of the Board, [Ontario Municipal Board] the Minister may close any road, other than a highway that is under the jurisdiction and control of the Ministry, that intersects or runs into a controlled-access highway.

(6) Any road heretofore or hereafter closed under this section by the Minister in accordance with the approval of the

Board by the placing or erecting of a fence, barricade or other work on the limit of a controlled-access highway shall be deemed to have been thereby legally closed.

Section 35 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201, is, in part, as follows,

35.-(1) In this section "centre point of an intersection" is the point where the centre line of the through part or parts of a controlled-access highway meets the centre line of or the centre line of the prolongation of any other highway that intersects or meets the controlled-access highway.

(2) Notwithstanding any general or special Act, regulation, by-law or other authority, no person shall, except under a permit therefor from the Minister,

(a) place, erect or alter any building, fence, gasoline pump or other structure or any road within 150 feet of any limit of a controlled-access highway or within 1,300 feet of the centre point of an intersection;

(b) place any tree, shrub or hedge, within 150 feet of any limit of a controlled-access highway or within 1,300 feet of the centre point of an intersection.

(c) sell, offer or expose for sale any vegetables, fruit or other produce or any goods or merchandise upon or within 150 feet of any limit of a controlled-access highway or within 1,300 feet of the centre point of an intersection;

(d) place, erect or alter any power line, pole line or other transmission line within one-quarter mile of any limit of a controlled-access highway;

(e) display any sign, notice or advertising device, whether it contains words or not, other than one sign not more than two feet by one foot in size displaying the name or the name and occupation of the owner of the premises to which it is affixed or the name of such premises within one-quarter mile of any limit of a controlled-access highway;

(f) use any land, any part of which lies within one-half mile of any limit of a controlled-access highway, for the purposes of a shopping centre, stadium, fair ground, race track, drive-in theatre or any other purpose that causes persons to congregate in large numbers; or

(g) construct or use any private road, entranceway, gate or other structure or facility as a means of access to a controlled-access highway.

(4) The Minister may order that subsection 2 or such clauses thereof as he specified do not apply within the limits of any city, town or village or such parts thereof as he specifies.

(11) The Minister may issue permits under this section in such form and upon such terms and conditions as he considers proper and may in his discretion cancel any such permit at any time.

In *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al. (1975), 9 O.R. (2d) 662,* where the applicants had applied to the Minister of Transportation and Communications for an access and land use permit pursuant to s. 35 of The Public Transportation and Highway Improvement Act, R.S.O. 1970, ch. 201 *[supra],* it was held the Minister was entitled to refuse to grant

a permit to the applicants on the ground that the applicants' intended use of their lands was in conflict with the official plan. On appeal, *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al. (1976), 14 O.R. (2d) 49,* the judgment of the Divisional Court was reversed. The judgment of the Court was delivered by Lacourciere, J.A., who said, beginning at p. 62,

> I am of opinion that the Minister of Transportation and Communications allowed himself to be influenced by extraneous, irrelevant and collateral considerations which should not have influenced him in the exercise of his discretion to refuse the entrance permit. It seems clear that the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic. All of its provisions deal with the procedure for the designation, acquisition, construction, maintenance and financing of roads, for determining the need for and use of, King's Highways, secondary highways, tertiary, resource, industrial, county, suburban, township, city, town, village and development roads.
>
> ... ...
>
> The discretion to issue permits should be construed with the concept in mind that it was intended to alleviate the restriction to private action otherwise imposed by the public requirements of traffic planning for controlled access. The discretion to refuse or grant the permit requested must be exercised having regard to traffic planning requirements. I was unable to find anywhere in the Act any official plan concerns. That may seem short-sighted under modern planning concepts, but the Act has not been amended to reflect such concepts. Furthermore, s. 35 specifically provides that the Acts traffic concerns are to override local planning concerns. The opening words of s-s. (2) of s. 35 of the Public Transportation and Highway Improvement Act, "Notwithstanding any general or special Act, regulation, by-law or other authority ...", make this plain.
>
> Apparently it was the Legislature's intent that neither the Planning Act (a general Act) nor zoning by-laws override this Act. It is clear from the words I have quoted and from the other provisions of the section that land use zoning was not to interfere in any way with traffic planning. In light of these provisions, it is difficult to understand how non-conformity with an official plan could be taken to be a ground within the scope and provisions of the Act.
>
> Thus it seems to me that the respondent Minister failed to exclude from his consideration a matter which is clearly not related to the policy or objects of the Public Transportation and Highway Improvement Act. I would go further and say that it is clear, on the overwhelming balance of probability, that the refusal of the entrance permit, apparently based on a planning consideration, was really a yielding to the mounting pressure for preserving the inner core of the Town of Tillsonburg from deterioration by reason of the impact on the urban renewal project of a large shopping centre on the outskirts of the town.

The Court also found that the principles of natural justice had not been observed when the proposed official plan was approved (contrary to assurances given by the Ministry of Treasury Economics and Intergovernmental Affairs) without requested changes being made and without referring the matter to the Ontario Municipal Board.

SECONDARY HIGHWAYS

Section 37 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

37. The Lieutenant Governor in Council may designate any highway as a secondary highway and thereupon Part I and all the other provisions of this Act and the regulations that apply to the King's Highway apply *mutatis mutandis* to such secondary highway.

TERTIARY ROADS

Section 38 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

38.-(1) The Lieutenant Governor in Council may designate an existing road that is in whole or in part in territory without municipal organization as a tertiary road, and thereupon the provisions of this Act and the regulations that apply to the King's Highway, except sections 30 and 31, apply *mutatis mutandis* to such tertiary road.

(3) No action shall be brought against the Crown for damages caused by the default of the Ministry in maintaining a tertiary road, and the Crown is not liable for any damage sustained by any person using a tertiary road.

RESOURCE ROADS

Subsection 1 of section 39 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

39.-(1) The Lieutenant Governor in Council may designate a tertiary road as a resource road.

INDUSTRIAL ROADS

Section 40 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

40.-(1) The Minister may designate as an industrial road a private road that he considers necessary for the development or operation of the lumbering, pulp or mining industry but which in his opinion should also be used by the public for road purposes other than those of the industry.

(2) The Minister and the owner of an industrial road may enter into an agreement for the maintenance of the industrial road by the owner, and as long as the owner permits the public to use the industrial road the Minister may direct payment out of the moneys appropriated therefor by the Legislature of such proportion of the cost of maintenance as he considers requisite.

(3) Notwithstanding any other Act, an industrial road remains a private road under the jurisdiction and control of the owner, but subject to the use of the public as described in subsections 1 and 2.

COUNTY ROADS

Section 41 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

41.-(1) A county may by by-law adopt a plan of county road construction and maintenance and establish a county road system by designating the roads in any municipality in the county that are to form the system and may include in the system such boundary-line roads between the county and any other county or between the county and a city or separated town as are agreed upon by the municipalities interested.

(4) Where a county acquires land for the purpose of widening a county road, the land so acquired, to the extent of the designated widening, forms part of the road and is included in the county road system, and subsection 7 does not apply thereto.

(5) A county may, by by-law, amend a by-law passed under this section in any manner, including the addition of roads to, or the removal of roads from, the county road system.

(7) Every by-law passed under this section shall be submitted to the Minister for approval by the Lieutenant Governor in Council and the Lieutenant Governor in Council may approve the by-law in whole or in part and, where the by-law is approved in part only, it shall be in force and take effect only so far as approved, but it is not necessary for the county to pass any further by-law amending the original by-law or repealing any part thereof that has not been approved, and every such by-law as so approved is in force and has effect on and after the day on which the approval is given.

(8) Every road that forms part of a county road system vests in the county and is under the jurisdiction and control of the county on and after the day on which the by-law designating the road is approved by the Lieutenant Governor in Council.

(9) Every road that is removed from a county road system vests in the local municipality in which it is situate and is under the jurisdiction and control of that municipality on and after the day on which the by-law removing the road is approved by the Lieutenant Governor in Council.

(10) Where the Minister is of opinion that a road that forms part of a county road system is not of sufficient importance to be constructed and maintained as part of the system, the Lieutenant Governor in Council may revoke the approval of the designation of the road as part of the system, and the road thereupon vests in the local municipality in which it is situate.

GAS PUMPS AND SIGNS ON COUNTY ROADS

Section 61 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

61.-(1) A county may, with respect to the roads under its jurisdiction and control, by by-law, prohibit or regulate,

(a) the placing, erecting or altering of any gasoline pump within 150 feet of any limit of a road; and

(b) the displaying of any sign, notice or advertising device within one-quarter mile of any limit of a road.

ROADS IN INDIAN RESERVES AND OTHER LANDS UNDER THE CONTROL OF THE GOVERNMENT OF CANADA

Section 62 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

62. The Minister may arrange with the Government of Canada for the construction or maintenance, under the supervision of the county road superintendent and in accordance with the requirements of the Minister, of any road in a township or part of a township constituting an Indian reserve or of any road under the control of the Government of Canada that lies within the limits of a municipality not separated from the county for municipal purposes where the road forms an extension of or connecting link in a county road system, and the Minister may direct payment to the county treasurer out of the moneys appropriated therefor by the Legislature of an amount equal to the percentage of the net expenditure made by the county under such arrangement as is provided for in section 47.

SUBURBAN ROADS

Section 63 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

63.-(1) The Lieutenant Governor in Council, upon application of a county in which a county road system is established under Part VII, [See section 41, *supra*, at pp. 152 and 153.] may direct that a commission be appointed in respect of each city or separated town in the county and, subject to the approval of the Minister, each commission may designate roads in the county road system as suburban roads and the city or separated town shall contribute towards the construction and maintenance of such roads in accordance with this Part.

(2) The construction and maintenance of suburban roads and the expenditure thereon shall be directed by the suburban roads commission.

Section 65. of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

65.-(1) Suburban roads continue to be county roads under the jurisdiction and control of the county and the construction and maintenance thereof shall continue to be under the supervision of the county road superintendent but subject to the direction of the suburban roads commission, ...

TOWNSHIP ROADS

Section 70 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is, in part, as follows,

70.-(1) Every township shall by by-law appoint a township road superintendent who, subject to the direction of the council, shall inspect all roads under the jurisdiction and control of the township and shall lay out and supervise all work on such roads.

(2) A copy of every by-law appointing a township road superintendent shall be transmitted to the Minister within thirty days of the passing thereof. 1971, ch. 61, s. 7.

(3) The township road superintendent shall conform to such requirements as the Minister may prescribe.

(4) The council of a township in which statute labour has been abolished by by-law shall submit annually to the Minister a statement showing the amount of salary and expenses of the township road superintendent paid by the township, together with a declaration of the township treasurer that the statement is correct and also a declaration of the superintendent that he has *bona fide* performed the duties of superintendent, and on receipt of the statement and declaration the Minister may direct the Treasurer of Ontario to pay to the township the amount to which the township is entitled under this section. [The former subsection 1 of section 70 provided for payment of 50 per cent, or such greater proportion as the Minister considered requisite, of the salary and expenses of such superintendent paid by the township.]

(6) Where a township receives aid from the Province in excess of 60 per cent of the cost of work done upon township roads, the Minister may appoint a road superintendent for the purpose of supervising work to be undertaken, and in that case it is not necessary for the township to appoint a road superintendent and the superintendent appointed by the Minister has and may exercise as to the work all the powers of a township road superintendent appointed under subsection 1.

ROADS IN INDIAN RESERVES IN ANY TOWNSHIP

Subsection 3 of section 73 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

73.-(3) The Minister may arrange with the Government of Canada for the appointment of a road superintendent to supervise the construction and maintenance, in accordance with the requirements of the Minister, of the roads in any township or part of a township constituting an Indian reserve, and, where such an arrangement has been made, the Government of Canada or, with the approval of the Government of Canada, the Band Council of the reserve may apply under section 74 for the subsidy authorized by this Part, [Part IX] and this Part, except section 70, applies *mutatis mutandis* thereto.

CITY, TOWN AND VILLAGE ROADS

Section 77 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, was repealed and the following substituted therefor by 1971, Vol. 2, ch. 61, s. 10,

77.-(1) The Minister shall annually advise every city, town and village of the moneys he has allocated to the city, town or village for road improvements for that year and the city, town or village shall file with the Minister not later than the 31st day of March a detailed estimate showing how such allocation is proposed to be spent.

(2) A city, town or village may submit to the Minister in the year in which the expenditure is to be made a request for a supplementary allocation of moneys for road improvements together with a detailed estimate showing how such allocation is proposed to be spent, and the Minister may make such supplementary allocation as he considers appropriate.

(3) No payment shall be made to any city or separated town in a county

that does not contribute towards the construction and maintenance of suburban roads.

(4) This section does not limit the power of a city, town or village to spend moneys raised by it for road improvement.

DISTRICT, METROPOLITAN AND REGIONAL MUNICIPAL ROADS

Sections 84*a*, 84*b* and 84*c* of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970. enacted by 1971, Vol. 2, ch. 61, s. 12, are as follows,

84*a*. Notwithstanding Part VI of THE MUNICIPALITY OF METROPOLITAN TORONTO ACT, Part IV of THE REGIONAL MUNICIPALITY OF OTTAWA-CARLETON ACT, Part V of THE REGIONAL MUNICIPALITY OF NIAGARA ACT, Part V of THE REGIONAL MUNICIPALITY OF YORK ACT and Part IV of THE DISTRICT MUNICIPALITY OF MUSKOKA ACT, this Part [Part X-A] shall apply in the year 1971 and in subsequent years.

84*b*. In this Part, [Part X-A] "municipality" means a district, metropolitan or regional municipality.

84*c*.-(1) The Minister shall annually advise every municipality of the moneys he has allocated to the municipality for road improvements for that year and the municipality shall file with the Minister not later than the 31st day of March a detailed estimate showing how such allocation is proposed to be spent.

(2) A municipality may submit to the Minister in the year in which the expenditure is to be made a request for a supplementary allocation of money for road improvements together with a detailed estimate showing how such allocation is proposed to be spent and the Minister may make such supplementary allocation as he considers appropriate.

(3) This section does not limit the power of a municipality to spend moneys raised by it for road improvement.

DEVELOPMENT ROADS

Section 85 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

85.-(1) The Minister may designate as a development road a road or proposed road under the jurisdiction and control of a town or village in a territorial district or of a township which because of the requirements of traffic he considers should be constructed, improved or maintained to a higher standard than is reasonable having regard to the economic situation of the municipality. 1973, ch. 67, s. 19.

(2) The Minister and the municipality may enter into an agreement for the construction or maintenance of a development road designated under subsection 1, and the Minister may direct payment out of the moneys appropriated therefor by the Legislature of such proportion of the cost thereof as he considers requisite.

(3) A development road designated under subsection 1 remains under the jurisdiction and control of the municipality.

ROADS IN TERRITORY WITHOUT MUNICIPAL ORGANIZATION

Section 86 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, is as follows,

86.-(1) The Minister may arrange with the local roads board elected under THE LOCAL ROADS BOARDS ACT [See Roads in unincorporated townships, *supra*, at pp. 132 and 133.] or with the road commissioners elected under THE STATUTE LABOUR ACT [See Part 4, *supra*, at p. 21.] or with a

person who is the owner of land in territory without municipal organization for the construction or maintenance of a road therein, and the Minister may direct payment out of the moneys appropriated therefor by the Legislature of an amount equal to such proportion of the cost of the cost of the work as he considers requisite.

(2) Where the Minister considers it desirable that the inhabitants of an territory without municipal organization should become incorporated under THE MUNICIPAL ACT, the amount that may be paid out under this section in respect of a road in that territory shall not exceed 50 per cent of the value of the labour employed on the work.

TOLL BRIDGES

Section 2 of THE TOLL BRIDGES ACT, R.S.O. 1970, ch. 464, is as follows,

2. The Lieutenant Governor in Council may designate the Skyway over the Burlington Canal, the Fort Frances Causeway, and Bridge over or tunnel under the Welland Canal or any international bridge or tunnel as a toll bridge.

Regulation 813 of Revised Regulations of Ontario 1970, designating THE BURLINGTON BAY SKYWAY and THE GARDEN CITY SKYWAY as toll bridges, and the tolls to be paid and collected by the Ministry of Highways and O. Reg. 206/72, revising the amounts to be paid and collected as tolls, were revoked by O. Reg. 677/73, which came into force on the 28th day of December, 1973 at 11:00 p.m.

PART 14 - THE MECHANICS' LIEN ACT AND OTHER STATUTES HAVING EFFECT ON PUBLIC STREETS OR HIGHWAYS

THE CREATION OF MECHANICS' LIENS

Subsection 1 of section 5 of THE MECHANICS' LIEN ACT, R.S.O. 1970, ch. 267, is as follows,

5.-(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who does any work upon or in respect of, or places or furnishes any materials to be used in, the making, constructing, erecting, fitting, altering, improving or repairing of any land, building, structure or works or the appurtenances to any of them for any owner, contractor or subcontractor by virtue thereof has a lien for the price of the work or materials upon the estate or interest of the owner in the land, building, structure or works and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as hereinafter provided, by the owner, and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, but delivery on the designated land does not make such land subject to a lien.

Subsection 2 of section 5 was repealed and the following substituted therefor by section 4 of The Mechanics' Lien Amendment Act, 1975, ch. 43,

(2) Where the land or premises upon or in respect of which any work is done or materials are placed or furnished is,

(a) a public street or highway owned by a municipality; or

(b) a public work,

the lien given by subsection 1 does not in any event attach to such land or premises but shall instead constitute a charge on amounts directed to be retained by section 11, and the provisions of this Act shall be construed, *mutatis mutandis*, to have effect without requiring the registration or enforcement of a lien or a claim for lien against such land or premises.

INTERPRETATION

Subsection 1 of section 1 of THE MECHANICS' LIEN ACT, R.S.O. 1970, ch. 267, is, in part, as follows,

1.-(1) In this Act,

(b) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or the placing or furnishing of materials for any of the purposes mentioned in this Act;

(ba) "Crown" includes Crown agencies to which THE CROWN AGENCY ACT applies; (1975, ch. 43, s. 1.)

(bb) "estate or interest in land" includes a statutory right given or reserved to the Crown to enter any lands or premises of any person or public authority for the purpose of doing any work, construction, repair or maintenance in, upon, through, over or under any such lands or premises; (1975), ch. 43, s. 1.)

(c) "materials" includes every kind of movable property;

(d) "owner" includes any person and corporation, including the Crown, a municipal corporation and a railway company, having an estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and

(i) upon whose credit, or

(ii) on whose behalf, or

(iii) with whose privity or consent, or

(iv) for whose direct benefit,

work is done or materials are placed or furnished and all persons claiming under him or it whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials placed or furnished have been commenced to be placed or furnished;

(da) "public work" means the property of the Crown and includes land in which the Crown has an estate or interest, and also includes all works and properties acquired, constructed, extended, enlarged, repaired, equipped or improved at the expense of the Crown, or for the acquisition, construction, repairing, equipping, extending, enlarging or improving of which any public money is appropriated by the Legislature, but not any work for which money is appropriated as a subsidy only; (1973, ch. 43, s. 1(1).)

(g) "subcontractor" means a person not contracting with or employed directly by the owner or his agent for any of the purposes mentioned in this Act, but contracting with or employed by a contractor or, under him, by another subcontractor;

(i) "workman" means a person employed for wages in any kind of labour, whether employed under a contract of service or not.

Subsection 2 of section 1 of THE MECHANICS' LIEN ACT, R.S.O. 1970, ch. 267, is as follows,

(2) In this Act, the expression "the doing of work" includes the performance of a service, and corresponding expressions have corresponding meanings.

Section 4 of THE MECHANICS' LIEN ACT, R.S.O. 1970, ch. 267, is as follows,

4.-(1) Every agreement, oral or written, express or implied, on the part of any workman that this Act does not apply to him or that the remedies provided by it are not available for his benefit is void.

(2) Subsection 1 does not apply,

(a) to a manager, officer or foreman; or

(b) to any person whose wages are more than $50 a day.

(3) No agreement deprives any person otherwise entitled to a lien under this Act, who is not a party to the agreement, of the benefit of the lien, but it attaches, notwithstanding such agreement.

Subsection 5 of section 11 was repealed and new subsections 5 and 5a were substituted therefor by subsection 2 of section 5 of The Mechanics' Lien Amendment Act, 1975, ch. 43. The new subsections are as follows,

> 11.-(5) The lien is a charge upon the amount directed to be retained by this section in favour of lien claimants whose liens are derived under persons to whom the moneys so required to be retained are respectively payable.
>
> (5a) Where the lien does not attach to the land by virtue of subsection 2 of section 5, and a person claiming a lien gives to the owner, or a contractor or subcontractor notice in writing of the lien, the owner, contractor or subcontractor so notified shall retain out of amounts payable to the contractor or subcontractor under whom the lien is derived an amount equal to the amount claimed in the notice.

In *Re Ellwood Robinson Ltd. and Ohio Development Co. Ltd. (1975), 7 O.R. (2d) 556,* a developer laid out a plan of subdivision and the plan of subdivision was registered. The municipality required that the roads as laid out on the plan of subdivision be constructed together with sewer and water lines within the confines of the roads before building permits would be issued for the construction of buildings on the lots. The contractor employed by the owner of the subdivision to construct the roads and install the sewer and water lines filed a lien both against parts of a road on the plan and a large number of lots on the plan. At least some of the lots abut on roads which the contractor constructed.

At that time, subsection 2 of section 5 was as follows,

> 5.-(2) Except for the purpose of section 11, the lien given by subsection 1 does not attach to any public street or highway or to any work or improvement done thereon.

The case was treated as one in which it was clear that the roads upon which the lien claimant worked were public streets and the lien claimant agreed that his lien was invalid in so far as it claims a lien on the streets; however, he claimed that his lien was valid as against the lots which abut upon those streets.

According to Gould, D.C.J., the exact situation had arisen before and had been dealt with by Master Bristow in *Niagara Concrete Pipe Ltd. v. Trustee of Estate of Charles R. Stewart Construction Co. Ltd. et al. [1956] O.W.N. 769.* In his judgment, Master Bristow held that, in view of section 5(2), there can be no lien upon abutting lands in respect of work done to a public street or highway.

Gould, D.C.J., refused to follow Master Bristow, saying that even if Master Bristow and he had co-ordinate jurisdiction, at least under The Mechanics' Lien Act, he was not bound by Bristow's prior decision because it had been given *per incuriam,* that is without considering some aspect of the case which ought to have been considered, presumably because this aspect of the case was never brought to the attention of the presiding officer.

Gould, D.C.J., felt that the learned Master had completely failed to deal with the words "upon or in respect of" which appeared twice in subsection 1 of section 5 as it then stood, which, in his opinion, were required to be considered. The Master in summarizing the provisions of subsection 1 of section 5 totally omitted reference to the words "or in respect of." From the point of view of Gould, D.C.J., those words could not be ignored in the situation with which he was dealing. He felt that when the subsection speaks of a lien in favour of any person who does any work "upon or in respect of" any land, etc., the absolutely necessary implication is that *under some circumstances* a lien may exist upon one parcel of land based upon work done upon another parcel of land otherwise the words "or in respect of" are completely meaningless. He was careful to say,

"This of course does not mean that it would be proper for me to rule now that work done upon the roads of a subdivision necessarily creates a lien upon abutting lots." He points out one substantial difference between the *Niagara Concrete Pipe* case and the case with which he had to deal: the judgment in the *Niagara Concrete Pipe* case was given at the close of a trial whereas he was being asked to vacate a lien on a motion with very little material before him.

Gould, D.C.J., felt that a possibility exists that the facts of a particular case might determine the application of the words "upon or in respect of" which work is done. He concluded that he was not bound by the decision in the *Niagara Concrete Pipe* case and that it would not be appropriate for him to decide the matter on a summary application and he dismissed the application with costs.

COMMENTS

Subsection 1 of section 5 remains the same as it was before *Re Ellwood Robinson Ltd. and Ohio Development Co. Ltd.*

The words "upon or in respect of" have since been imported into subsection 2 of section 5.

The present wording of subsection 2 of section 5 would seem to make it clear that the land or premises upon which any work is done or materials are placed, or in respect of which any work is done, etc., is not subject to the lien given by subsection 1, but, instead, the lien constitutes a charge against the fund directed to be retained by section 11. Subsection 2 applies only to land which is a public street or highway owned by a municipality or a public work, and it has no application to privately owned lands including private roads.

Section 5, in its present form, is consistent with the view expressed by Gould, D.C.J., in *Re Ellwood Robinson Ltd, and Ohio Development Co. Ltd.*

Under the former subsection 2 of section 5 of THE MECHANICS' LIEN ACT, R.S.O. 1970, ch. 267, [See p. 161, *supra*.] it might have been arguable that where a claimant had failed to file the lien given by subsection 1 of section 5 until after the land or some part or parts of the land affected by the lien had become a public street or highway, the lien could not attach to the street or highway even though it was presented for registration within the time allowed by the Act. Be that as it may, the present subsection 2 of section 5 does not affect a lien that has been acquired against the land of a private owner under subsection 1 of section 5.

Once the estate or interest of the owner of land is subject to a lien, the lien will not cease to be effective as to any part or parts of the land merely because a municipality or the Crown has subsequently acquired such part or parts of the land either by purchase or by expropriation, or because the owner has subsequently dedicated the land or some part or parts of the land to the public use, whether as a park, road, street, lane, square, highway or for any other public purpose. Unless the land or premises upon or in respect of which any work is done or materials are placed or furnished is a public street or highway owned by a municipality, or a public work, subsection 2 of section 5, as it presently exists, has no application.

Question if it is open to the parties to a contract for work to be done or materials to be supplied to agree that no lien is to attach to any part or parts of the land in respect of which the

work is to be done or upon which the materials are to be placed or furnished to be used, the dedication of which is within the contemplation of the parties as evidenced by the contract and that the lien given by subsection 1 of section 5 shall instead constitute a charge on amounts agreed to be retained in trust by the owner in accordance with section 11 as if the land at the time when the right to the lien or to the charge in lieu of a lien first arose had been a public street or highway owned by the municipality or a public work.

The time when a street or highway became a public street or highway may be an important factor in deciding whether or not a lien has attached to the land upon which it is laid out. Where a public road or highway is established by the common law method, i.e., by the owner of the land offering to dedicate a road or highway to the public and the acceptance of the offer to dedicate by the public, the road or highway vests in the municipality having jurisdiction and control over it: *The City of Hamilton v. Morrison (1868), 18 U.C.C.P. 228.* Where a highway is established at common law, a by-law to establish it as a highway is unnecessary: *Lockie v. Township of North Monaghan (1917), 12 O.W.N. 171; City of Ottawa v. Grand Trunk R.W. Co.; City of Ottawa v. Ottawa and New York R.W. Co. (1921), 50 O.L.R. 239; The Township of Pembroke v. The Canadian Central Railway Company (1882), 3 O.R. 503; Township of Bertie v. Snyder et al. [1933] O.W.N. 43; Schraeder v. The Township of Grattan [1945] O.R. 657.* In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication. This assent may be presumed from the expenditure of public money upon the road but it may be shown in other ways: *Re Sanderson and Township of Sophiasburgh (1916), 38 O.L.R. 249, per* Middleton, J., at p. 252. The requirements necessary to show acceptance are also mentioned in *St. Vincent v. Greenfield (1887), 15 O.A.R. 567.* A registered plan of subdivision is not binding upon the person who registered it or upon any other person unless a deed or mortgage in which the land is described in accordance with the plan has been registered: Subsection 10 of section 78 of THE REGISTRY ACT, R.S.O. 1970, ch. 409; subsection 1 of section 172 of THE LAND TITLES ACT, R.S.O. 1970, ch. 234. In *Roche v. Ryan (1892), 22 O.R. 107,* on an appeal to the Divisional Court, Galt, C.J., had this to say at p. 115, "I consider that when lots have been sold abutting on a street, the property in that street is absolutely vested in the corporation, unless a change in the plan should be made with the consent of the persons to whom the various lots have been sold." Before a street or highway shown on a plan of subdivision has been assumed by the council of the municipality in which it is located, the council of the municipality may apply to a judge under section 86 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, to cancel or suspend in whole or in part any registered plan and to close, divert or alter any or all highways, roads, streets or lanes shown on any such plan, either temporarily or permanently, or pending the suspension of the plan, and see section 163 of THE LAND TITLES ACT, R.S.O. 1970, ch. 234, to the same effect. Where a street or highway is closed by a judge's order pursuant to section 86 of THE REGISTRY ACT, R.S.O. 1970, ch. 409, it or the part so closed belongs to the owners of the land abutting thereon; subsection 2 of section 57 of THE SURVEYS ACT, R.S.O. 1970, ch. 453. After a street or highway has been assumed by the municipal council as a public street or highway, it can only be closed by a by-law of the municipal council: *Re Plan 69, Dunnville, [1950] 2 D.L.R. 688 (C.A.).* Where a street or highway has been assumed by a municipality and closed by by-law, if the council determines to sell such stopped-up highway, the price at which it is to be sold shall be fixed by the council and the owner of the land that abuts on it has the right to purchase the soil and freehold of it

at that price: subsection 1 of section 461 of THE MUNICIPAL ACT, R.S.O. 1970, ch. 284. Subject to THE LAND TITLES ACT or THE REGISTRY ACT as to the amendment of plans, every road allowance, highway, street, lane, walk and common shown on a plan of subdivision shall be deemed to be a public road, highway, street, lane, walk and common respectively: subsection 1 of section 57 of THE SURVEYS ACT, R.S.O. 1970, ch. 453. Where lots have been sold fronting on an allowance for road according to a registered plan of subdivision, the allowance for road is vested in the municipality having jurisdiction and control over it even though it has never been assumed by municipal by-law for public use and public moneys have never been expended on it, but subject to THE LAND TITLES ACT or THE REGISTRY ACT as to the amendment of plans: *Re Westwood Addition, Hamilton, [1945] 2 D.L.R. 300, [1945] O.R. 257; Boland v. Baker, [1953] 2 D.L.R. 455.* ... it may well be that until ... a sale (of a lot according to the plan) is made the allowances for roads shown on the plan remain vested in the owner by whom the plan was registered: *per* Robertson, C.J.O., in *Re Westwood Addition, Hamilton, [1945] O.R. 257 at p. 263.* Note the difference in result where a street or highway laid down on a plan of subdivision is closed by judge's order and where, having first been assumed by the municipality, it is closed by municipal by-law. This would seem to indicate that a street or highway laid down on a plan of subdivision does not vest absolutely in the municipality having jurisdiction and control over it, even though a lot has been sold fronting on a street or highway according to the registered plan, until it has been assumed by the municipality for public use.

LIMITATION OF ACTIONS

Section 2 of THE LIMITATIONS ACT, R.S.O. 1970, ch. 246, is as follows,

> 2. Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiesence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

Section 3 of THE LIMITATIONS ACT, R.S.O. 1970, ch. 246, is as follows,

> 3.-(1) No entry, distress, or action shall be made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty.
>
> (2) Subsections 1 to 3, 5 to 7 and 9 to 12 of section 5 and sections 6, 8 to 11 and 13 to 15 apply to rights of entry, distress or action asserted by or on behalf of Her Majesty.

Section 4 of THE LIMITATIONS ACT, R.S.O. 1970,ch. 246, is as follows,

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such an entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

Section 15 of THE LIMITATIONS ACT, R.S.O. 1970, ch. 246, is as follows,

15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

Section 16 of THE LIMITATIONS ACT, R.S.O. 1970, ch. 246, is as follows,

16. Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

In *Catkey Construction (Toronto) Ltd. et al. v. Banks et al. [1970] 2 O.R. 687*, Cudney, Co. Ct. J., said, at pp. 693 to 695,

In respect to the first issue, I find that the defendants did not obtain through their predecessors in title a freehold title or right to the road allowance either under s. 461 (of The Municipal Act, R.S.O. 1960, ch. 249) or by possession at common law or the Limitations Act.

Counsel for the defendants refers to the old iron fence which runs east and west and which has stood for many years a foot or so north of the sidewalk on Queens Ave., and to the affidavits of Dr. Hall, Mr. Blanchard and Mr. Furtney, predecessors in title, indicating continuous, adverse and uninterrupted possession from 1945 to 1968.

The defendants undertook in the agreement of purchase and sale and purported in their deed tendered by Mr. Browne on January 20th to convey a freehold title in fee simple subject to an existing mortgage. Section 461 (of The Municipal Act) [See now THE MUNICIPAL ACT, R.S.O. 1970, ch. 284, s. 445 at p. 13, *supra*.] would give, at the most, only legal possession to the defendants and would not give them freehold title in fee simple which latter they were to acquire and which they purported to convey. Legal possession falls short of legal title. A tenant has legal possession of land during his tenancy but legal title of the land is in the landlord.

... in the present case the issue does not concern the acquisition of a possessory title as between private persons. Rather it concerns the alleged acquisition of a possessory title to a road allowance which was owned by a municipality until December, 1968. It is a well established principle of law that a possessory title or any prescriptive right, other than under s. 461 [now s. 445] (of The Municipal Act), cannot be obtained to or over a road allowance either opened or unopened. I find that the defendants did not obtain a possessory title to the road allowance in question. I refer to the book of Mr. Ian Rogers, Q.C., on The Law of Canadian Municipal Corporations, 1959, vol. 2. He says, at p. 1088:

"once a highway, always a highway" is a succinct way of expressing the cardinal rule of law that a highway, once established, continues to be a highway until altered or put an end to by some competent authority. It follows that mere non-user is not enough to destroy the character of a street as a public highway. Moreover, the rights of the public are of such a character that they cannot be lost by adverse possession over the prescriptive period, or by

> acquiescence or estoppel. This rule applies with equal force to unopened road allowances which cannot be extinguished except by statutory proceedings properly taken, or in certain cases where an owner has given land for a road in lieu thereof. The only way the right of the public can be destroyed or extinguished is by some formal proceedings being taken for that purpose under statutory authority. Hence the conveyance of a road without a by-law to close it does not have the effect of putting an end to it nor can the repeal of a by-law opening a road have this effect: *(Cameron v. Wait (1873) 3 O.A.R. 175, affg. 27 U.C.Q.B. 475, affd. Cassels S.C. 332; R. v. McGowan (1877) 17 N.B.R. 191 ... Colchester South v. Hackett (1927) 61 O.L.R. 77 at 83; Anticknap v. St. Catharines (1920) 32 O.L.R. 255 at 257; Brown v. Edmonton (1894) 23 S.C.R. 308; Halifax v. Reeves (1894) 23 S.C.R. 340 ... Windsor v. Gordon (1920) 19 O.W.N. 238 ... Toronto Electric Light Co. v. Toronto (1915) 33 O.L.R. 267, ... Big Point Club v. Lozon [1943] O.R. 491, [1943] 4 D.L.R. 136, Nash v. Glover (1876) 24 Gr. 219. ... Winslow v. Dalling (1899) 1 N.B. Eq. 608; Shaw v. St. Andrews 57 Que. S.C. 417 ... Piper v. Paiponge (1905) 6 O.W.R. 287.)*

RIGHTS, TITLES OR INTEREST IN ALLOWANCES FOR ROAD ACQUIRED BY PERSONS BEFORE THE 13TH DAY OF JUNE, 1922

It is not to be forgotten that municipal councils are a part of the machinery for civil government of this Province, and that to them have been delegated many of the powers both of legislation and of administration which by the British North America Act are vested in the Provincial Legislatures.

In the municipal councils is vested the control of the streets and highways within the limits of their municipalities, with certain exceptions to which it is unnecessary to refer; and upon the corporations of these municipalities is imposed the duty of keeping them in repair, which involves, according to the decided cases, keeping them free from obstructions which expose to danger travellers upon them; and in case of failure to perform that duty, the corporation in default is liable criminally and is also liable in damages to any person who has sustained injury to his person or property by reason of that failure: *per* Meredith, C.J.O., in *Toronto Electric Light Co. v. City of Toronto (1915), 33 O.L.R. 267, at p. 275, [Appellate Division] affd. [1917] A.C. 84. [Privy Council]*

As soon as they were laid out by the King's surveyors, the original allowances for road became public highways; and, as soon as the report of the surveyor was confirmed either by the magistrates in quarter sessions themselves in the absence of opposition, or by a jury in case of opposition, the roads laid out or opened by the magistrates in quarter sessions became public highways. In both cases, the roads were public highways before any work was done on them. [See *Palmatier v. McKibbon (1894), 21 O.A.R. 441*, at p. 2, *supra*.]

All powers, duties or liabilities vested in or belonging to the magistrates in quarter sessions with respect to any particular highway, road or bridge in Upper Canada were vested by the statute 12 Vic. ch. 81, s. 190 in the municipal corporation of the county in which it was situate. [See p. 5, *supra*.]

By section 331 of the Municipal Institutions Act, 1859, 22 Vic. ch. 54, the council of every township, county, city, town and incorporated village was given authority to pass by-laws for, amongst other things,

> selling the original road allowances to the parties next adjoining whose lands the same is situated, when a public road has been opened in lieu of the original road allowance and for the site or line of

which compensation has been paid, and for selling in like manner to the owners of any adjoining land, any road legally stopped up or altered by the Council; and in case such parties respectively refuse to become the purchasers at such price as the Council thinks reasonable, then for the sale thereof to any other person for the same or a greater price.

Section 332 of the Municipal Institutions Act, 1859, 22 Vic. ch. 54, enacted as follows,

332. In case any one in possession of a concession road or side line has laid out and opened a road or street in place thereof without receiving compensation therefor, or in case a new or travelled public road has been laid out and opened in lieu of an original allowance for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance, the owner, if his lands adjoin the concession road, side line, or original allowance, shall be entitled thereto, in lieu of the road so laid out, and the Council of the Municipality upon the report in writing, of its Surveyor, or of a Deputy Provincial Land Surveyor, that such new or travelled road is sufficient for the purposes of a public highway, may convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs, and when any such original road allowance is, in the opinion of the Council, useless to the public, and lies between lands owned by different parties, the Municipal Council may, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties as may seem just and reasonable; and in case compensation was not paid for the new road, and the person through whose lands the same passes does not own the land adjoining the original road allowance, the amount received from the purchaser of the corresponding part of the road allowance when sold, shall be paid to the person who at the time of the sale owns the land through which the new road passes.

Section 333 of the Municipal Institutions Act, 1859, 22 Vic. ch. 54, said,

333. In case a person be in possession of any part of a Government allowance for road laid out adjoining his lot and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or in case a person be in possession of any Government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed legally possessed thereof as against any private person, until a by-law has been passed for opening such allowance for road by the Council having jurisdiction over the same.

Section 336 of the Municipal Institutions Act, 1859, 22 Vic. ch. 54, provided as follows,

336. Every public road, street, bridge or other highway, in a City, Township, Town or Incorporated Village, shall be vested in the Municipality, subject to any rights in the soil which the individuals who laid out such road, street, bridge or highway, reserved, and except any concession or other road within the City, Township or Town or Incorporated Village, taken and held possession of by an individual in lieu of a street, road or highway, laid out by him without compensation therefor.

There appears to be no doubt, to-day, that, subject to the two exceptions therein mentioned, that section vested in the municipality, not only the public roads, etc., but the soil and freehold of them also.

In an article entitled ONCE A HIGHWAY ALWAYS A HIGHWAY, published in 1908, in Vol. 28 of The Canadian Law Times Review, Mr. F. W. Wegenast said,

> To summarize: If the municipal corporation "owns its streets," it would seem in its proprietary capacity to be bound by the Statute of Limitations; and subject to whatever weight there may be in the maxim, "Once a highway always a highway," the right of action of the corporation as owner of the soil would be barred by the statutory period of ten years. If the Crown owns the freehold in the soil it would seem to be barred in sixty years from the time when the right of action first accrued.
>
> The right of the public to the use of the highway is, subject to the power of the municipality to open, close, sell, etc., and, it might well be argued, should be concurrent with the rights of ownership in the municipality and extinguishable with the proprietary rights, if they exist in the municipality. Or it might be argued that the municipality, having under section 600 of the Municipal Act, full "jurisdiction" over highways, should be bound by its laches, there being no such doctrine in its favour as there is in favour of the Crown.

Whatever merit there may be in such a theory, it would appear upon close analysis that the title of a municipality to the public roads vested in it is unaffected by operation of the Limitations Act, notwithstanding that possession by a squatter in excess of ten years may have been had before the 13th day of June, 1922.

In *Township of Colchester South v. Hackett (1927), 61 O.L.R. 77, [Appellate Division]* the land in question was part of a tract granted to the plaintiff municipality by Crown grant dated 12th January, 1869, to hold in trust for a public wharf and public purposes connected therewith. The defendant claimed that the municipality's title was extinguished by force of the Statute of Limitations.

Hodgins, J.A., said, at p. 83,

> Whatever rights against the public, whose trustee the plaintiff was, the defendant could acquire, must be those depending on a user or an occupation clearly inconsistent with and adverse to the rights of those for whose benefit the trust was created, and this the evidence falls far short of doing. The onus is upon the defendant, for, as said by Lord Shaw of Dunfermline in *Secretary of State for India v. Chelikani Rama Rao (1916), L.R. 43 Ind. App. 192, 204, 32 Times L.R. 652, 655,* "it would be contrary to legal principles ... to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." The reasons which make the Statute of Limitations inapplicable to the Crown would seem to apply equally when the rights of the public are those common to all subjects of the Crown; and to apply it to those rights would allow the negligence of the trustee to result in the alienation of the trust property and the destruction of the public right, which the trustee could not legally do directly: see *Canadian Pacific Railway Co. v. Guthrie (1901), 31 Can. S.C.R. 155; Grand Trunk Railway Co. v. Valliear (1904), 7 O.L.R. 364.* The grant from the Crown vests the title in the plaintiff "forever in trust for a public wharf and public purposes connected therewith." This trust is not for a section of the public nor for the benefit of the inhabitants of the township only, but for all of her Majesty's subjects in the Dominion, and is in that respect similar to the position of a highway, as indeed a public wharf and approaches in fact are. The wharf is shewn on the plan, exhibit 1, as a Government wharf, and no evidence was given to negative this description. It is a public place. See *Clement v. Northern Navigation Co. Ltd. (1918), 43 O.L.R. 127.*

"Once a highway always a highway" is an established maxim (*per* Byles, J., in *Dawes v. Hawkins, (1860), 8 C.B.N.S. 848;* "for the public cannot release their rights, and there is no extinctive presumption of prescription" (pp. 857, 858). This *dictum* was approved in *Cubitt v. Maxse (1873), L.R. 8 C.P. 704,* and *Piggott v. Goldstraw (1901), 84 L.T.R. 94,* and was followed in this Province in *Nash v. Glover (1876), 24 Gr. 219,* as to an original road allowance which had been in the possession of the defendant for over 40 years. In *Regina v. Hunt (1865), 16 U.C.C.P. 145,* it was held that after a road has acquired the legal title of a highway it is not in the power even of the Crown, by grant of the soil and freehold thereof to a private person, to deprive the public of their right to use the road. That acquiescence or neglect or estoppel short of 40 years cannot bar the rights of the public is laid down in *Toronto Electric Light Co. v. City of Toronto (1915), 33 O.L.R. 267,* affirmed by the Privy Council, *[1917] A.C. 84.*

The intention of the Crown to dedicate to public uses is found in the Crown grant, and the acceptance of this dedication by the plaintiff is seen in the fact that two wharfs have been erected and used successively on the water-lot and that from time to time the land portion has been used for the storage of ties and timber as goods in transit. As pointed out in a similar case, *Simplot v. Chicago etc. Railway Co. (1883), 16 Fed. Repr. 350 at pp. 359, 360,* by Mr. Justice Shiras: "It must be kept in mind that this strip or reservation was not conveyed to the city as its private property. The public retained its full rights therein, and the city held the title as a trustee for the furtherance of the public uses and purposes to which the property had been originally dedicated."

It is not however necessary to decide whether in this case judgment can and should be entered upon this ground, as in my opinion the defence fails to establish its contention.

The defendant appealed to the Supreme Court of Canada and Duff, J., who delivered the judgment of the Court, reported in *[1928] S.C.R. 255,* said, at pp. *256, 257,*

... I have been very much impressed by the force of the reasons given by Mr. Justice Hodgins in support of his suggestion that the lands which were the subject of the grant to the municipality were thereby dedicated to a public use, a dedication which was accepted by the public (of this acceptance there is abundant evidence) and that this dedication gave rise to a right of enjoyment by the public, closely analagous to the right of the public in respect of a public highway, and that such rights are not, nor is a title such as that of the municipality, given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by the provisions of the Statute of Limitations upon which the appellant founds his case. I think there is a great deal to be said for that view. And I venture to add this to what Mr. Justice Hodgins has said in support of it. The appellant can only succeed upon the hypothesis that the municipality has lost its title. If that be so, it follows that, as concerns the piece of land in question, the object of the trust has necessarily failed. It would seem, again, to follow, on ordinary principles, that a resulting trust has arisen in favour of the Crown. The equity of the Crown, of which the appellant had notice, it might be forcibly argued on the authority of *In re Nisbet and Potts' Contract [1906] 1 Ch. 386,* is not affected by the Statute of Limitation, because independently of the exceptional position of the Crown, the appellant cannot maintain the position of a purchaser for value without notice. And, once more, it would follow, if this be so, that only the bare legal

> title is extinguished, and whatever possession the appellant may have, is held by him subject to the equitable estate of the Crown. It is difficult to think of so impotent a conclusion as one contemplated by the statute.
>
> Mr. Denison suggests that all property given for charitable purposes is really trust property, and that the title of the property so held is not exempt from the Statute of Limitations. As to this, it should be noticed that here we are only concerned with property which is granted by the Crown to a public body subject to an express trust to permit the public to enjoy in it rights of physical user, as in a highway.
>
> I do not think, however, that it is strictly necessary to express a decided opinion on this point. The Appellate Division has held that, having regard *inter alia*, to the fact that the land was the property of the municipality, and in the same enclosure and held under the same title as an adjoining area from which the municipality was never dispossessed, the appellant has failed satisfactorily to establish dispossession from the piece in dispute. There is no doubt that, as to the critical years 1915 and 1916, the evidence is vague, and in some respects quite unsatisfactory. On the whole, I am not convinced that the Appellate Division has taken an erroneous view.

Although the remarks made by Hodgins, J.A., in the Appellate Division of the Supreme Court of Ontario, and by Duff, J., in the Supreme Court of Canada, in *Township of Colchester South v. Hackett, supra,* about the ineffectiveness of the Statute of Limitations to extinguish the right of the public to the use of a public street or other property granted by the Crown to a municipality in trust for the public, are obiter, they leave no doubt how that case would have been decided had the defendant proved that he had had adverse possession of the land in dispute for a period in excess of ten years.

What was said would seem to apply with equal force to the situation where an unopened road allowance is vested in a municipal corporation. Under section 333 of the Municipal Institutions Act, 1859, 22 Vic. ch. 54, the right of a person to remain in possession of any part of an original allowance for road enclosed by a lawful fence is subject to the paramount right of the municipal council to pass a by-law, at any time, for opening such allowance for road. In view of that section it is difficult to imagine a situation in which a squatter could successfully maintain the position of a purchaser for value without notice in respect to any part of an unopened road allowance. Keith, J., expressed a different view in *Di Cenzo Construction Co. Ltd. v. Glassco et al.* and *Di Cenzo Construction Co. Ltd. v. City of Hamilton (1976), 12 O.R. 677,* in which he gave Di Cenzo judgment against the City for $24,019.50 in the second action and dismissed Di Cenzo's action against the Glasscos in the first action. The City of Hamilton appealed against the judgment in the second action and Di Cenzo appealed against the judgment in the first action. The Court of Appeal set aside the judgment of Keith, J., in the second action and substituted a judgment dismissing that action with costs and it dismissed the appeal in the first action with costs. The appeal, which was heard September 28 and 29, 1977, has not been reported.

The possession of an unopened road allowance or any part of an unopened road allowance enclosed by a lawful fence by the owner of an adjoining parcel of land is good against everyone but the municipality and the municipality may lawfully interfere with such

possession at any time without passing a by-law for opening it to the public. See *Gordon v. Hall and Hall (1958), 16 D.L.R. (2d) 379,* [p. 16, *supra*.] where it was held that the fence, in that case, enclosing part of an unopened road allowance, contravened a municipal by-law and therefore it was unlawful and could not be regarded as a fence at all.

REGULATIONS

In Ontario, a regulation, rule, order or by-law is a regulation within the meaning of THE REGULATIONS ACT, R.S.O. 1970, ch. 410, if it is of a legislative nature, made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, and does not fall within one of the exceptions numbered *i* to *vi* in clause *d* of section 1 of THE REGULATIONS ACT, R.S.O. 1970, ch. 410.

Unless it comes within one of the exceptions, a regulation within the meaning of THE REGULATIONS ACT must be filed with the Registrar of Regulations. Such a regulation, unless otherwise stated in the regulation, comes into force and has effect on and after the day upon which it is filed and, except where otherwise provided by the Act, a regulation that is not published has no effect.

Ordinarily a regulation must be published within one month of its filing but the time for filing may be extended at any time by order of the Minister (the Attorney General) and a regulation that is not published is not effective against a person who has not had actual notice of it.

There are two classes of regulations, those which are filed with the Registrar of Regulations and published in The Ontario Gazette and those which are neither filed nor published under the Act, i.e., regulations which are not regulations within the meaning of THE REGULATIONS ACT.

THE BOUNDARIES ACT, R.S.O. 1970, ch. 48, THE LAND TITLES ACT, R.S.O. 1970, ch. 234, and THE REGISTRY ACT, R.S.O. 1970, ch. 409, all provide that the Lieutenant Governor in Council may do certain things which are of a legislative nature by regulation and, none of these things being within any of the exceptions or group of exceptions numbered *i* to *vi* in clause *d* of section 1 of THE REGULATIONS ACT, the regulations made pursuant to those Acts must be filed and published in accordance with the requirements of THE REGULATIONS ACT. On the other hand, THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT, R.S.O. 1970, ch. 201, states, in subsection 1 of section 5, that the Lieutenant Governor in Council may designate a highway or proposed highway as the King's Highway. This is one of the exceptions mentioned in the group of exceptions numbered *iv* in clause *d* of section 1 of THE REGULATIONS ACT and, therefore, an order in council designating a highway or proposed highway as the King's Highway cannot be filed or published under THE REGULATIONS ACT. However, subsection 2 of section 5 of THE PUBLIC TRANSPORTATION AND HIGHWAY IMPROVEMENT ACT requires that such an order in council be registered in the proper land registry office.

STATUTORY RULES OF CONSTRUCTION

Subsection 1 of section 14 of THE INTERPRETATION ACT, R.S.O. 1970, ch. 225, is as follows,

> 14.-(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,

(a) revive any Act, regulation or thing not in force or existing at the time at which the repeal or revocation takes effect;

(b) affect the previous operation of any Act, regulation or thing so repealed or revoked;

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;

(d) affect any offence committed against any Act, regulation or thing so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof;

(e) affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Act, regulation or thing had not been so repealed or revoked.

STATUTES - WHEN IN FORCE

Sections 4 and 5 of THE STATUTES ACT, R.S.O. 1970, ch. 446, are as follows,

4. The Clerk of the Assembly shall endorse on every Act, immediately after the title of the Act, the day, month and year when it was assented to, or reserved by the Lieutenant Governor, and the day, month and year of the prorogation of the session of the Legislature at which it was passed, and, where the Act is reserved, the Clerk shall also endorse thereon the day, month and year when the Lieutenant Governor has signified either by speech or message to the Assembly or by proclamation, that it was laid before the Governor General in Council and that the Governor General was pleased to assent thereto, and such endorsements shall be taken to be a part of the Act.

5.-(1) Unless otherwise provided therein, every Act comes into force and takes effect on the sixtieth day after the prorogation of the session of the Legislature at which it was passed or on the sixtieth day after the day of signification, whichever is the later date.

(2) Where a session of the Legislature is ended by dissolution of the Legislature, the date of the dissolution shall for the purposes of this section be deemed to be the date of the prorogation. Amended, 1974, ch. 83, s. 2.

Note: Prior to the 1st day of January, 1919, the date of the assent or signification, which ever was the case, was the date on which an Act commenced unless the Act provided for a later commencement.

June 23, 1978.

FIRST EDITION - December, 1978.
FIRST PRINTING - 450 copies.

ISBN 0-7743-3688-9